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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1990

CITY OF EL CENTRO,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

J. MARK WAXMAN
Counsel of Record
JAMES R. KALYVAS
WEISSBURG AND ARONSON, INC.
2049 Century Park East
Suite 3200
Los Angeles, California 90067
(213) 277-2223
Attorneys for Petitioner
City of El Centro

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether suspected illegal aliens were detained where Border Patrol officers activated their red emergency lights during a vehicular pursuit, pulled alongside the pursued vehicle, a chase and crash ensued and, during the aliens' entire hospital stay for treatment of injuries resulting from the crash, the Immigration and Naturalization Service ("INS") continued on-site investigation, monitoring, and control of the aliens?

2. Can the United States avoid the payment obligation of an implied-in-fact contract created in an emergency situation, where it has requested the services provided and accepted their benefits, by claiming, after the fact, its representative lacked actual authority to enter into the contract?

LIST OF PARTIES

The parties before the Court of Appeals for the Federal Circuit were the City of El Centro and the United States.

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PETITION FOR A WRIT OF CERTIORARI

The City of El Centro petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinions of the United States Claims Court are reported at 16 Cl. Ct. 500 (1989) (Appendix A-45-A-68, *infra*) and 17 Cl. Ct. 794 (1989) (Appendix A-25-A-44,

infra). The opinion of the court of appeals is reported at 922 F.2d 816 (Fed. Cir. 1990) (Appendix A-1-A-24, *infra*).

JURISDICTION

The opinion of the court of appeals issued and judgment was entered on December 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. § 249:

Medical care and treatment of certain quarantined and detained persons

Persons entitled to treatment

(a) Any person when detained in accordance with quarantine laws, or, at the request of the Immigration and Naturalization Service, any person detained by that Service, may be treated and cared for by the Public Health Service.

Temporary treatment in emergency cases

(b) Persons not entitled to treatment and care at institutions, hospitals, and stations of the Service may, in accordance with regulations of the Surgeon General, be admitted thereto for temporary treatment and care in case of emergency.

Authorization for outside treatment

(c) Persons whose care and treatment is authorized by subsection (a) of this section may, in accordance with regulations, receive such care and treatment at the expense of the Service from public or private medical or hospital facilities other than those of the Service, when authorized by the officer in charge of the station at which the application is made.

STATEMENT OF THE CASE

Petitioner adopts, substantially unchanged, the trial court's statement of the case as set forth in *City of El Centro v. United States*, 16 Cl. Ct. 500, 501-503 (1989). Appropriate references to the record have been inserted.

At approximately one o'clock on the morning of January 23, 1985, agents of the Border Patrol observed a van parked on the American side of the boundary between the United States and Mexico near El Centro, California. (J. Stip., ¶ 3, J.A. pp. 481-82 Exs. 101 and 102, J.A. pp. 429-33.)[1] The van was parked at a location which was notorious to the Border Patrol as a rendezvous point for alien smugglers and persons who had crossed the border illegally. (*Id.*) At about the same time, Border Patrol sensors indicated that a large group of persons was moving on foot in the direction of the van. (*Id.*)

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[1] "J. Stip." refers to the Joint Memorandum Re: Stipulations filed in the Claims Court. "Ex." or "Exs." refers to exhibit or exhibits. "J.A." refers to the joint appendix lodged with the Court of Appeals. "Tr." refers to testimony of witnesses contained in the trial transcript.

Shortly thereafter, agents observed the van leaving the area. (J. Stip. ¶ 5, J.A. p. 482; Exs. 101 and 102, J.A. pp. 429-33.) Two Border Patrol agents followed in their cruisers, activating their red emergency lights. (J. Stip. ¶ 5, J.A. p. 482; Tr. 181 and 189, J.A. pp. 221, 229.) In fact, at one point during the pursuit, Border Patrol Agent Pacrem pulled alongside the van with his red emergency lights activated. The driver of the van refused to stop, and a high-speed chase ensued. (J. Stip. ¶ 5, J.A. p. 482.)

After having been pursued for some distance on California's Highway 8, the van, still travelling at speeds in excess of 60 miles per hour, turned onto an exit ramp. Unable to negotiate the ramp's curve at that speed, the van vaulted over an embankment, crashed, exploded and began to burn. The two agents in pursuit quickly arrived at the crash scene, extinguished the flames, and radioed for help. (J. Stip. ¶ 5, J.A. p. 482; Tr. pp. 176-177 and 185-86, J.A. pp. 217-218 and 225-26; Exs. 101 and 102, J.A. pp. 429-33)

All nineteen of the persons inside the van had entered the United States illegally. The driver and two of the passengers died in the crash. (Exs. 15 and 18, J.A. pp. 376 and 388.) Many of the survivors were grievously injured; all were unable to leave the scene under their own power. (Tr. pp. 85, 178, 185-86, J.A. pp. 128, 219, 225-26; Ex. 3, J.A. p. 344; Exs. 101 and 102, J.A. pp. 429-33.) Fourteen of the aliens were taken by ambulance to El Centro Community Hospital ("ECCH") for treatment. (Exs. 15 and 16, J.A. pp. 376 and 388.)[2] (Trial

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[2] The other two surviving aliens were taken to another hospital, and the cost of their care is not the subject of this litigation. (J. Stip. ¶ 10, J.A. p. 483, Ex. 51, J.A. p. 427.)

testimony established that, were it not for their physical condition, the survivors would have immediately been taken into physical custody and ultimately deported by INS.) (Tr. p. 182, J.A. p. 222; Tr. pp. 88-89, J.A. pp. 228-29.)

Supervisory Border Patrol Agent Douglas Roy ordered Agent Mario Hernandez to proceed to ECCH and, *inter alia*, gather information on the names, dates and places of birth, and medical conditions of the aliens. (Tr. p. 74, J.A. p. 117.) Agent Hernandez was dispatched to the hospital before the aliens arrived and reached the hospital ahead of them. (Tr. p. 76, J.A. p. 119.) Although he had not participated in the high-speed chase, Agent Hernandez was aware of the facts leading to the accident. (Tr. p. 74, J.A. p. 117.) Moreover, Agent Hernandez was wearing his Border Patrol uniform on which his badge was displayed. (Tr. pp. 78-79, J.A. pp. 121-22.)

At the hospital, Agent Hernandez identified himself as a Border Patrol Agent. (Tr. pp. 30-31, J.A. pp. 75-76.) He then informed Kaye Fox, the Assistant Director of Finance, that the Border Patrol had been in pursuit of the van involved in the accident. (Tr. pp. 31-32, J.A. pp. 74-75.) Exactly what happened next is the subject of some disagreement. On this issue, the court heard testimony at trial from Kaye Fox, Jay Comstock, the hospital's administrator, and Agent Mario Hernandez.[3] (Tr. pp. 45-46, 63-66, and 76-77, J.A. pp. 88-89, 106-09, and 119-20.)

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[3] Fox's testimony was in the form of a videotaped deposition, as she had died of cancer prior to the date of trial. Addressing the credibility of Ms. Fox's testimony, the court noted that "In Ms. Fox's position, when she testified in March of '86 I believe it was, she was dying of cancer and knew it. She

(Continued on following page)

The testimony of all three witnesses established that a further conversation took place between Fox and the uniformed Agent Hernandez just as the injured aliens were being admitted to ECCH. (*Id.*) In that conversation, Fox identified herself as ECCH's financial officer. She then asked Agent Hernandez who was responsible for payment of the cost of the alien's care. According to Fox and Comstock, Agent Hernandez replied that the INS was responsible and would pay the bill since the injured aliens were in the custody of the Border Patrol. (Tr. pp. 45-46 and 64-65, J.A. pp. 88-89; Ex. 18, J.A. pp. 107-08.) According to Agent Hernandez, when Fox asked him who would pay, his response was "Me and you." (Tr. pp. 97-99, 105 and 109-110, J.A. pp. 140-42, 148, and 151-52.) At trial, Agent Hernandez explained that in saying this, he meant "the taxpayers" as distinct from "the government or the Agency." (Tr. pp. 97-99, J.A. pp. 140-42.)

Hernandez further testified that he informed Supervisory Border Patrol Agent Douglas Roy, his supervisor, by telephone that ECCH's financial officer had raised a concern with respect to payment and he had responded, "Me and you." (Tr. pp. 109-110, J.A. pp. 140-42.) Despite the susceptibility of this response to varying interpretations, the government presented no evidence or testimony that there was any subsequent INS effort to clarify it.

(Continued from previous page)

had left the hospital and knew that she couldn't be undercut in any way or affected by plain testimony." (Tr. p. 258, J.A. p. 22.) The court also found that Ms. Fox, as Assistant Director of Finance, and Mr. Comstock, as the hospital administrator, would both have payment concerns very much in mind. (*Id.*)

In addition to the discussion of payment, Agent Hernandez had further interaction with hospital personnel during his visit there on the night of the accident. An ECCH nurse brought Agent Hernandez a Guatemalan passport which belonged to one of the injured aliens;[4] Agent Hernandez took possession of the passport and signed for it. (Tr. pp. 31-32 and 79-80, J.A. pp. 74-75 and 122-23; Ex. 35, J.A. p. 400.) Further, over a four hour period on the night of the accident, agent Hernandez obtained information on each of the alien patients as his supervisor had directed; in addition, he informed a nurse that as soon as any of the aliens was ready to be released from ECCH, such alien was to be released to the custody of the Border Patrol. (Tr. pp. 75 and 77, J.A. pp. 118 and 120.) A nurse then notified Agent Hernandez that one of the aliens had minor injuries and was likely to be released in the morning; after conferring with his supervisor by telephone, Agent Hernandez instructed the nurse to call the Border Patrol when the alien was ready to be released, and said that the Border Patrol would come for him. (J. Stip. ¶ 17, J.A. p. 485.)

On the next morning and continuing through the ensuing days, a number of other Border Patrol and INS officials continued on-site investigation, monitoring, and control of the aliens at ECCH. On the morning of January 23, Donald L. Davis, Officer-in-Charge of the El Centro Border Patrol station, telephoned Kaye Fox and

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[4] The passport belonged to Cesar Augusto Flores de Leon, who, although initially admitted to ECCH, was air-lifted to University Hospital in San Diego that same night. (J. Stip. ¶ 22, J.A. p. 487.)

requested that she notify the Border Patrol when any of the aliens was about to be released. (Tr. p. 34, J.A. p. 77; Ex. 19, J.A. p. 389.) On January 23 and 24, two INS investigators, Mel Gray and R.E. Novak, visited ECCH and took photographs of the aliens. (J. Stip. ¶¶ 19 and 20, J.A. p. 486; Tr. pp. 38-44, J.A. pp. 81-87; Ex. 18, J.A. p. 388.) Several of the aliens were unable to sign ECCH's required consent form. Notwithstanding the fact that no judicial action was taken to authorize it, Investigator Novak signed the forms on behalf of these aliens on a line marked "Patient/Parent/Conservator/Guardian." (*Id.*, Ex. 17, J.A. pp. 378-87.) In addition, an INS physician, Dr. Pavlik, visited ECCH and, again without attempting to obtain judicial authority to do so, secured the release of the aliens' medical records. Dr. Pavlik stated he was "responsible for medical follow-up to make sure [ECCH] doctors were taking care" of the aliens, and that he would be working with the ECCH doctors as a "consultant" or "referring physician" during the aliens' treatment. (Tr. pp. 48-50, J.A. pp. 91-92; Ex. 18, J.A. p. 388.)

Each time an alien patient became ready for release from hospitalization, ECCH personnel informed the Border Patrol, which then sent agents who took the alien into physical custody.[5] (J. Stip. ¶ 22, J.A. p. 487, Exs. 23-31, 33, 34, and 36, J.A. pp. 394-405, 407, 408 and 410.) The only exception was Miguel Perez-Lopez who surreptitiously left the hospital on or about January 26. But even as to Lopez, ECCH communicated with INS. (J. Stip. ¶ 24, J.A. pp. 487-488.) An internal Border Patrol memorandum on

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[5] The last alien patient to be released from hospitalization was Olga Cerrito-Escobar, discharged March 18, 1985, more than seven weeks after the accident. (Ex. 21, J.A. p. 392.)

this subject, written by Agent Jeffrey Parsons to Officer-in-Charge Davis, stated:

> At 12:05 p.m. on January 26, 1985[,] I received a call from the Charge Nurse, Debbie Eugenio, from El Centro Community Hospital. She stated that one of *our* injured aliens was missing and they presumed that he had *escaped*.

(emphasis added) (Ex. 2, J.A. p. 343.) Officer Davis entered the notation "escape" next to Lopez' name on a Border Patrol list. (Tr. p. 120; Ex. 51 J.A. pp. 162 and 428.)

Finally, within hours of their admission to ECCH, Kaye Fox wrote two memoranda on the subject of the aliens, one to the nursing staff, the other to Jay Comstock, ECCH administrator. In them, Fox manifested her understanding that (1) the aliens were "in custody" of the INS, and (2) the INS had assumed payment responsibility for their care. (Exs. 18 and 19, J.A. pp. 388 and 389; J. Stip. ¶¶ 14, 15 and 16, J.A. pp. 484-485; Tr. pp. 35-36, J.A. pp. 78-79.)

The medical expenses incurred by ECCH in treating the fourteen injured aliens were stipulated to be $183,263.64. (J. Stip., ¶ 30, J.A. p. 490.) ECCH made repeated contacts to individuals at all levels of the INS regarding its claims for payment and to where they should be directed, including Deputy Chief Manuel Cazares, the INS Regional Counsel, and James O'Keefe, the Administrator in charge of management of the INS Western Regional Office. (Ex. 20, J.A. pp. 390-391; Tr. pp. 46-49, J.A. pp. 89-92; Tr. p. 116, J.A. p. 158.) Ultimately, the separately filed claims were individually denied by the Regional Commissioner of the Western Region of the INS, Harold W. Ezell. (J. Stip. ¶¶ 31 and 32, J.A. pp. 490-491; Exs. 41-50. J.A. pp. 415-426.)

The government has stipulated in this case that:

> Defendant, United States of America, through the Immigration and Naturalization Service ("INS") is responsible for the care of individuals taken into custody or detained by the United States Border Patrol as suspected illegal aliens.

(J. Stip. ¶ 2, J.A. p. 481.)

The United States Claims Court asserted jurisdiction under the Tucker Act, 28 U.S.C. § 1491. The court of appeals accepted jurisdiction under 28 U.S.C. § 1295(a)(3).

REASONS FOR GRANTING REVIEW

I.

THIS COURT SHOULD RESOLVE THE CLEAR CONFLICT AMONG THE JUDICIAL CIRCUITS, MANIFESTED BY THIS DECISION, AS TO WHETHER A SEIZURE OR DETENTION OF THE OCCUPANTS OF A VEHICLE HAS OCCURRED WHERE, IN A VEHICULAR PURSUIT, LAW ENFORCEMENT AUTHORITIES ACTIVATE THEIR EMERGENCY LIGHTS SIGNALING THE VEHICLE TO STOP.

A. Introduction

This case arises in the context of a stipulation by the government that the Immigration and Naturalization Service is responsible for the care of individuals taken into custody or detained by the United States Border Patrol as suspected illegal aliens. Because of the government's stipulation, whether there was a detention in this case is determinative of the government's obligation to pay ECCH. Consequently, this case squarely presents the issue of when, in circumstances involving a vehicular

pursuit by law enforcement officers there has been a show of authority sufficient to constitute a seizure or detention.

In *Michigan v. Chesternut*, 486 U.S. 567, 575, n.9, 108 S. Ct. 1975, 1980, n.9, 100 L.Ed.2d 565 (1988), this Court noted that the United States suggested in its amicus curiae brief that in some circumstances, "police pursuit 'will amount to a stop from the outset or from an early point in the chase, if the police command the person to halt and indicate that he is not free to go.' . . . " Noting that such circumstances were not presented to the Court in that case, the Court stated "[w]e therefore leave to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." *Id.* This case presents the opportunity for the Court to (1) determine the circumstances in which police pursuit amounts to a seizure; (2) resolve a conflict among the judicial circuits as to the circumstance in which a police pursuit amounts to a seizure; and (3) clarify for the lower federal and state courts and law enforcement agencies throughout the country the scope of its decision in *Brower v. County of Inyo*, 489 U.S. 593, 109 S. Ct. 1378, 103 L.Ed.2d 628 (1989) on this issue.

The position of the Ninth Circuit and pre-*Brower* Eighth Circuit decisions is that when a law enforcement officer signals a motorist to stop, through the use of either his or her siren or red or blue emergency lights, there has been a seizure which must be justified under the Fourth Amendment. The position of the Sixth and Federal Circuits is that no seizure occurs under such circumstances. Instead, those circuits have held that during the initial stages of a pursuit, where an individual

flees rather than obey the officer's directive to stop conveyed by activation of his or her vehicle's emergency lights, there is no seizure.

The Court should resolve this conflict to provide direction to the circuit, district and state courts, and law enforcement offices at all levels of government, as to the circumstances in which a vehicular pursuit amounts to a seizure, thereby invoking the protections of the Fourth Amendment.

B. The Decision Below

In this case, the government stipulated that it is responsible for the medical care of suspected illegal aliens taken into custody or detained by the Border Patrol. *City of El Centro v. United States*, 922 F.2d 816, n.4 (Fed. Cir. 1990); *City of El Centro v. United States*, 16 Cl. Ct. 500, 505; J. Stip., ¶ 2, J.A. p. 481. The trial court determined that based on all of the circumstances surrounding this incident, the illegal aliens were detained by the INS, and therefore the government had a duty to provide and pay for medical treatment for the detainees. The trial court based its conclusion, in part, on the fact that "two Border Patrol agents followed [the suspected illegal aliens] in their cruisers, activating their red emergency lights. The driver of the van refused to stop, and a high speed chase ensued." *City of El Centro v. United States*, 16 Cl. Ct. at 501. The Court of Appeals, relying on this Court's decision in *Brower v. County of Inyo, supra*, determined that "the INS pursuit of the fleeing vehicle which ended in the crash was insufficient to place the aliens in INS detention; to the extent the Claims Court's holding is

to the contrary it is incorrect as a matter of law." *City of El Centro v. United States*, 922 F.2d at 823. The circuit court also stated that "the events [in this case] appear insufficient to constitute the government's having 'detained' the aliens either prior to or during their hospitalization." *Id.* (citing *Brower v. County of Inyo*, 489 U.S. at 596, 109 S. Ct. at 1381.)

C. The Split Among The Circuits

The decision of the Federal Circuit in this case as to when a vehicular pursuit by law enforcement officers constitutes a detention is consistent with the holdings of the Sixth Circuit on this issue. However, the Federal Circuit and Sixth Circuit positions are in direct conflict with decisions of the Eighth and Ninth Circuits, which have held that when a law enforcement officer signals a motorist to stop, through the use of a siren or activation of red or blue emergency lights, there has been a seizure which must be justified under the Fourth Amendment. *United States v. Robert L.*, 874 F.2d 701 (9th Cir. 1989); *United States v. Morrison*, 546 F.2d 319, 320 (9th Cir. 1976) (*per curiam*); *see also United States v. Kerr*, 817 F.2d 1384, 1386 (9th Cir. 1987) ("the vast majority of automobile stops are initiated by police officers using flashing lights or a siren and are clearly Fourth Amendment seizures"); *United States v. Owens*, 472 F.2d 780 (8th Cir. 1973); *United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971); *Carpenter v. Sigler*, 419 F.2d 169 (8th Cir. 1969). But *cf. Roach v. City of Frederickstown, Mo.*, 882 F.2d 294 (8th Cir. 1989); *Patterson v. City of Joplin, Mo.*, 878 F.2d 262 (8th Cir. 1989).

The Ninth Circuit position on the issue of when police pursuit amounts to a detention or seizure is summarized by the court in its *per curiam* decision in *United States v. Morrison*, 546 F.2d 319 (9th Cir. 1976). In that case, the court considered the government's appeal of the trial court's decision granting appellee's motion to suppress evidence. The government asserted that the trial court erroneously disregarded evidence of the appellee's actions after Border Patrol officers signaled him to stop in determining whether the agents made the stop based upon reasonable suspicion. *United States v. Morrison*, 546 F.2d at 320.

In upholding the trial court's ruling, the court of appeals held that:

> When a law enforcement officer signals a motorist to stop by use of a siren or red light, there has been a seizure which must be justified under the Fourth Amendment. *United States v. Ward*, 488 F.2d 162, 169 (9th Cir. 1973) (*in banc*); *Carpenter v. Sigler*, 419 F.2d 169, 171 (8th Cir. 1969). The seizure occurs when the officer first communicates the command to halt. The command must be valid when given; its character is not changed by the motorists' response, any more than probable cause for a search can be established by what the search discloses. *United States v. Di Re*, 332 U.S. 581, 595, 68 S. Ct. 222, 92 L.Ed. 210 (1948).

United States v. Morrison, 546 F.2d at 320. *Accord U.S. v. Robert L.*, 874 F.2d 701 (9th Cir. 1989); *see also United States v. Kerr*, 817 F.2d 1384, 1386 (9th Cir. 1987).

The Eighth Circuit has also addressed the issue of the circumstances under which police pursuit constitutes a detention on several occasions. The pre-*Brower* position of the Eighth Circuit is set forth in *Carpenter v. Sigler*, 419 F.2d 169 (8th Cir. 1969). In *Carpenter*, the court reviewed the trial court's determination finding that certain evidence admitted against the defendant was not the result of an unlawful search and seizure in violation of the Fourth Amendment. *Carpenter v. Sigler*, 419 F.2d at 170.

The operative facts in *Carpenter* are set forth by the court as follows:

> The [police] officers kept [a] . . . vehicle under surveillance for a period noticing it slowly move by several business establishments which were closed. Then by the use of their flashing red light, the officers signaled the driver to pull the vehicle to the curb. No traffic violation was observed. The driver of the auto complied with the flashing red light and the car stopped with the police car approximately twenty-five feet behind the other auto.

Id. at 170. Ultimately, the stop of the car resulted in a search of its interior and discovery of burglary tools which lead to the defendant's conviction.

In affirming the trial court's determination that the evidence was validly seized, the court of appeals noted that the important Fourth Amendment issues presented were (1) whether there was a "search" or "seizure," and (2) whether they were "reasonable." In finding that there was a seizure, the court stated that:

> The Supreme Court recently in *Terry v. Ohio* . . . defined the Fourth Amendment term seized for the purpose of police-citizen street

> encounters. The Court said 'It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person.' [citations omitted]. [¶] It would appear from the record in this case that [the defendant] was 'seized' when the police officers signaled him to pull to curb by the use of their flashing red light. . . .

Id. at 171. The holding in *Carpenter* regarding the point of seizure has been followed by the Eighth Circuit in its subsequent opinions in *United States v. Nicholas*, 448 F.2d 622, 624 (8th Cir. 1971) and *United States v. Owens*, 472 F.2d 780, 785 (8th Cir. 1973). But *cf. Roach v. City of Frederickstown, Mo.*, 882 F.2d 294 (8th Cir. 1989) (Without reference to its prior decisions on the issue of seizure in the context of police pursuit, and citing *Brower v. County of Inyo*, 489 U.S. 593, 109 S. Ct. 1378, 103 L.Ed.2d 628 (1989), the court concluded that no seizure occurred, despite activation of red flasher lights, where the suspect attempted to flee and subsequently lost control of his car and crashed); *Patterson v. City of Joplin, Mo.*, 878 F.2d 262, 263 (8th Cir. 1989) ("The Court [in *Brower*] also stated that where a police car chases a suspect, who unexpectedly loses control of the car and crashes, no fourth amendment seizure occurs.")[6]

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[6] In an action pursuant to 42 U.S.C. § 1983, the court must determine whether there is a "seizure," and if so, whether the seizure is unreasonable. *See Brower*, 489 U.S. at 596, 109 S. Ct. at 1382. The Eighth Circuit decisions in *Roach* and *Patterson* seemingly collapse this two part test into a single test of whether there is a "seizure." In *Roach, Patterson*, and *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986), the courts could have found, consistent with the Ninth Circuit and other Eighth Circuit decisions, that

(Continued on following page)

The Sixth Circuit's contrary analysis of the detention issue, in the context of police pursuit, is represented by the holding in *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986). In *Galas*, the parents of a thirteen-year-old driver brought an action, pursuant to 42 U.S.C. § 1983, on behalf of the minor driver and themselves against the police for injuries to the driver following a high speed chase of the driver resulting in a crash. The court recited the principal facts of that case as follows:

> On March 16, 1983, Officer Richard McKee . . . of the Metropolitan Nashville-Davidson County, Tennessee Police Department observed a 1972 Oldsmobile automobile allegedly travelling well in excess of speed limit at a speed the officer estimated to be between 65 and 70 miles per hour. By activating the blue lights and siren on the police motorcycle he was operating, Officer McKee signaled the driver of the Oldsmobile to pull over and stop. However, rather than stopping, the operator of the Oldsmobile accelerated, and a high speed pursuit by Officer McKee ensued. (¶) The pursuit, which reached speeds of 100 miles per hour, ended when the driver of the Oldsmobile lost control of his automobile, ran off the roadway and wrecked. . . .

(Continued from previous page)

activation of the emergency lights constituted a "seizure," but that for purposes of civil liability under 42 U.S.C. § 1983, the "seizure" was not unreasonable. This analysis is consistent with the *dicta* in *Brower v. County of Inyo, supra*, in which this Court stated that no *unconstitutional* seizure occurs when a person being chased in a vehicular pursuit loses control and crashes. The Constitution only protects against *unreasonable* searches and seizures. Therefore, even if there is a seizure, as long as it is not conducted in an unreasonable manner, there is no constitutional violation.

Id. at 201-202. In reaching its decision that no seizure occurred in that case, the court reasoned that:

> In the instant case, there was no exercise of physical force. Thus, the remaining question is whether the defendant officer, by a show of authority, restrained the liberty of the minor plaintiff. Clearly, during the initial stages of the pursuit when the minor plaintiff decided to flee rather than to obey the defendant officer's directive to stop, the minor plaintiff was not restrained. Just as clearly, when the pursuit terminated in an accident with personal injury to the minor plaintiff, he was not restrained by, or as a result of, the officer's show of authority. Rather, the minor plaintiff's inability to leave was because he wrecked his automobile, and no seizure occurred.

Id. at 203.

Thus, the test employed by the Sixth Circuit and followed by the Federal Circuit to determine whether a seizure has occurred does not examine the "show of authority" and whether, in response to that showing, a reasonable person would believe he or she was free to leave; rather, it focuses on whether an individual suspect chooses to flee rather than submit to the show of authority.

In summary, in the Ninth Circuit, activation by police or law enforcement officers of emergency lights constitutes a seizure for purposes of the Fourth Amendment. The Sixth and Federal Circuits have found that the activation of emergency lights does not constitute a detention or seizure under the Fourth Amendment. The Eighth Circuit has taken positions on both sides of the issue. The conflict among and within the circuits on this fundamental issue affecting federal and state courts, as well as the administration of justice throughout the country, is ripe for resolution by this Court,

and the present case provides the vehicle for the Court to resolve the conflict.

D. The Importance Of The Issue

Since its decision in *Terry v. State of Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968), this Court has repeated its position that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L.Ed.2d 497 (1980); *Michigan v. Chesternut*, 486 U.S. 567, 575, 108 S. Ct. 1975, 1977, 100 L.Ed.2d 565 (1988); *Florida v. Royer*, 460 U.S. 491, 502, 103 S. Ct. 1319, 1326, 75 L.Ed.2d 229 (1983). This Court has noted that:

> While the 'free to leave' test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police. The test's objective standard – looking to the reasonable man's interpretation of the conduct in question – allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. [citations omitted.]

Michigan v. Chesternut, 486 U.S. at 574, 108 S. Ct. at 1979.

Further, in *Michigan v. Chesternut*, this Court rejected the petitioner's argument that "the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority." *Michigan v. Chesternut*, 486 U.S. at 572, 108 S. Ct. at 1979. Rather, the Court stated:

> that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account 'all the circumstances surrounding the incident' in each individual case. [citations omitted.]

Id.[7]

As is evident from the conflict in the decisions of the circuit courts of appeals discussed above, there is no consistent application of the "free to leave" concept in the context of vehicular pursuits by police or law enforcement officers. Further, application of the concept has become more divergent as a result of various interpretations of this Court's decision in *Brower*.

Prior to the Court's decision in *Brower*, although application of the "free to leave" test, in the context of vehicular pursuits, varied depending on the circuit considering the issue, the parameters of the test as announced by the Supreme Court were clear. As summarized by one commentator:

> If the actions towards the police would be perceived by a reasonable person as directed toward taking custody of the suspect, that is sufficient to bring the Fourth Amendment's protections into play, for then, as stated in *Mendenhall*, 'a reasonable person would have believed that he was not free to leave.' The 'free to leave' concept, in other words, has nothing to

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[7] Applying the above test in *Michigan v. Chesternut*, this Court concluded no seizure had occurred, noting:

> The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt, or displayed any weapons; or that they operated the car in an aggressive manner . . .

Michigan v. Chesternut, 486 U.S. at 579, 108 S. Ct. at 1980.

> do with a particular suspect's choice to flee rather than submit or with his assessment of the probability of successful flight. Were it otherwise, police would be encouraged to utilize a very threatening but sufficiently slow chase as an evidence-gathering technique whenever they lack even the reasonable suspicion needed for a *Terry* stop.

3 W. LaFave, SEARCH AND SEIZURE, § 9.2(h) (2d Ed. 1987, 1990 Supp. at pp. 59-62). Since this Court's decision in *Brower*, the test to be applied in determining whether a seizure has occurred in such instances is no longer clear. Although not essential to its holding in *Brower*, there is language in the opinion which is arguably contrary to the test for determining when a "seizure" has occurred announced in the Court's prior decisions.

The holding in *Brower* is that "it is enough for a seizure" that a person pursued is stopped by "the very instrumentality set in motion or put in place in order to achieve that result." *Brower*, 489 U.S. at 599, 109 S. Ct. at 1382. Thus, the Court in *Brower* concluded, the allegations of the complaint that Brower was meant to be stopped by a roadblock, and was stopped, were sufficient to allege a seizure had occurred for purposes of the plaintiff's civil action pursuant to 42 U.S.C. § 1983. However, in its opinion the Court addressed various hypothetical situations and issues, not presented for determination in that case, which have been interpreted by both federal and state courts in a manner inconsistent with this Court's prior decisions regarding the determination of whether a "show of authority" amounts to a seizure or detention.

In particular, in cases where a suspect is being pursued by police or law enforcement officials in a law enforcement vehicle, and the suspect loses control of that vehicle during the chase resulting in a crash and injuries result, several

courts have relied on the *Brower* decision to support a holding that, as a matter of law, a vehicle collision resulting after a vehicular pursuit by law enforcement officers does not constitute a "seizure," regardless of the surrounding circumstances. *See City of El Centro v. United States*, 922 F.2d 826 (1990); *Roach v. City of Frederickstown, Mo.*, 882 F.2d 294 (8th Cir. 1989); *Patterson v. City of Joplin, Mo.*, 878 F.2d 262 (8th Cir. 1989).

Further, statements in this Court's decision in *Brower* have lead to divergent interpretations by the circuits regarding whether the "governmental intent" necessary to support a finding of a "seizure" is to be judged by an objective or subjective standard. Despite the Court's statement in *Brower* that "we do not think it practical to conduct . . . an inquiry into subjective intent," *Brower*, 489 U.S. at 598, 109 S. Ct. at 1382, subsequent to the *Brower* decision, the circuit courts have not consistently used an objective test in determining whether the government intended to terminate an individual's freedom of movement.

In *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990), the First Circuit held that no Fourth Amendment seizure occurred when a hostage was inadvertently shot during police pursuit of a robbery suspect, where police officers shot at the car for the purpose of stopping the robber's flight. The First Circuit held that:

> [a] police officer's deliberate decision to shoot at a car containing a robber and a hostage *for the purpose of stopping the robber's flight* does not result in the sort of willful detention of the hostage that the Fourth Amendment was designed to govern. . . . [N]o Fourth Amendment seizure occurred here because [the plaintiff] was not the object of the police bullet that struck him.

Landol-Rivera, 906 F.2d at 795 (emphasis in original). In contrast, the Fifth Circuit in *Jamieson v. Shaw*, 772 F.2d 1205 (5th Cir. 1985), held that the plaintiff was seized when officers deliberately placed a roadblock in front of the car in which they knew she was a passenger, even though it was undisputed that the plaintiff was not the target of the roadblock. The Fifth Circuit held that the intent to stop the car was enough to constitute a seizure under the Fourth Amendment. *Id.* Thus, the varying interpretations of *Brower* are creating inconsistent determinations of when a "seizure" occurs, and such inconsistent determinations should be addressed by this Court.

The present case presents an opportunity for the Court to insure uniformity in the application of the test for determining when a seizure or detention takes place in a vehicular pursuit and to clarify for the lower federal courts, state courts, and law enforcement agencies the parameters of its decision in *Brower*.

II.

THIS COURT SHOULD DECIDE WHETHER, IN AN EMERGENCY SITUATION, THE GOVERNMENT CAN REQUEST SERVICES UNDER CIRCUMSTANCES CREATING AN IMPLIED-IN-FACT CONTRACT TO PAY FOR THE SERVICES, KNOWINGLY ACCEPT THE BENEFITS OF THE SERVICES REQUESTED, AND SUBSEQUENTLY REFUSE TO PAY ON THE GROUND THAT THE GOVERNMENT REPRESENTATIVE AGREEING TO PAYMENT LACKED ACTUAL AUTHORITY

A. Introduction

This Court has not addressed the limits of the government's right to repudiate payment obligations incurred by it for services or goods needed to respond to

an emergency situation on the ground that the governmental representative promising payment lacks the requisite authority. Third parties coming to the aid of government in times of emergency, by providing goods or services at the request of the government and pursuant to a promise by the government to pay, are precluded by the emergency at hand from performing a diligent investigation into the authority of the governmental actor requesting such services. Therefore, the Court must provide guidance for such parties as to when, under such circumstances, the government will be required to perform its promises.

Although this Court has addressed a related issue in the context of a Fifth Amendment taking (*International Paper Company v. United States*, 282 U.S. 399, 51 S. Ct. 176, 75 L.Ed. 410 (1931)), it has not addressed the applicability of the lack of authority defense in the context of an implied-in-fact contract created in an emergency situation. Third parties dealing with the government are at risk for having accurately ascertained the limits of governmental authority. An investigation into the limits of authority of each government representative is not possible in an emergency situation. Therefore, the Court should address and resolve this issue so that individuals providing service at the request of government officials in an emergency situation will know, in advance, whether a government promise to pay will be honored and, therefore, whether to provide the service.

B. The Decision Below

The trial court, after consideration of all of the facts in this case, concluded that:

> These circumstances illustrate that, between these parties, the equivalent of mutual assent was present [citation omitted]. Put another way, the parties' conduct indicates that plaintiff and defendant, in fact, took upon themselves corresponding obligations and liabilities and, viewed objectively, came to that meeting of the minds sufficient to establish an implied-in-fact contract. [Citations omitted.]

City of El Centro v. United States, 16 Ct. Cl. at 507-08.

The trial court also concluded that because the case arose from an emergency situation the implied-in-fact contract was enforceable, even though the government representative creating the contract, Agent Hernandez, did not have actual authority to do so. *Id.* at 508-509; *El Centro v. United States*, 17 Ct. Cl. 794, 797-799. The court reached its conclusion based on an application of the theories of inherent authority, acceptance of benefits, and institutional ratification.

The circuit court determined that the trial court's factual finding that there was "a sufficient meeting of the minds to establish mutuality of intent to contract," was not clearly erroneous. *City of El Centro v. United States*, 922 F.2d 816, 820 (1990). Nevertheless, the circuit court rejected the application of the doctrines of inherent authority, acceptance of benefits, or institutional ratification as theories which would preclude the government from repudiating its obligation to pay created by the implied-in-fact contract. *Id.* at 821. The circuit court's legal conclusion regarding the authority issue in this case is due to its erroneous application of existing authority in the area and the absence of guidance by this Court as to the circumstances in which the above doctrines preclude the government from repudiating a payment obligation

based on an implied-in-fact contract created in an emergency situation on the ground that the party promising to pay did not have actual contracting authority.

C. The Importance of the Issue

As noted by the circuit court in its opinion, "whatever the form in which the government functions, anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority." *City of El Centro v. United States*, 922 F.2d at 820 (quoting *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S. Ct. 1, 3, 92 L.Ed. 10 (1947)). Precisely because third parties contracting with the government are presumed to know the circumstances under which the government is required to keep its promises, it is critical that this Court provide clear guidance to third parties and the lower federal courts on this issue.

This Court has previously addressed the issue of repudiation by the government of its obligations in the context of an action seeking compensation for the taking of property rights. *See International Paper Company v. United States*, 282 U.S. 399, 51 S. Ct. 176, 75 L.Ed. 410 (1931). In that case, the petitioner sought to recover compensation for property rights in water of the Niagara River alleged to have been taken by the United States for war purposes. The petitioner had been notified by the Secretary of War that the United States was requisitioning all of its electrical power output resulting from the use of water diverted from the Niagara River. In reversing the Court of Claims' decision refusing compensation, this Court, in an opinion delivered by Justice Holmes, stated:

> The government has urged different defences with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that if a technical defect of authority had been pointed out it would have been remedied at once. The government exercised its power in the interests of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late. . . .

Id. at 406.

In *International Paper Company*, the Supreme Court found it sufficient to support the obligation to pay the fact that the President was authorized to make such an appropriation even though at that time the Secretary was not delegated such authority by Congress. Thus, in an emergency situation, where the government requested and received services and retained the benefit thereof, the Supreme Court has determined avoidance of the payment obligation for such services cannot be accomplished through a claim of lack of authority on behalf of the governmental actor requesting the services. Although *International Paper* was not decided in the context of an implied-in-fact contract, its reasoning is equally sound in this context.

In addition to this Court's holding in *International Paper Company*, decisions by the Court of Claims and several district courts have applied similar reasoning in

finding that a claim of lack of authority will not justify the government's refusal to pay for services requested and received.[8]

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[8] *Halvorson v. United States*, 126 F. Supp. 898, 901 (E.D. Wash. 1954) (at government inspector's request contractor removed one to four feet of snow from building attics after blizzard, the district court permitted recovery to the contractor noting "whether or not the resident inspector, Mr. Jackson, and his superior, the resident engineer, had authority to bind the government by express contract or to modify the written contract by oral agreement, they did, in the emergency situation created by the damage done by the blizzard, have authority to direct the contractors to proceed at once to minimize the damage by immediate remedial action."); *Philadelphia Suburban Corp. v. United States*, 217 Ct. Cl. 705, 707 (1978) (Coast Guard requested and suggested it would pay for plaintiff's fire retardant foam in fighting oil fire resulting from the collision of two vessels. The Coast Guard never paid and claimed Coast Guard representative at fire had no authority to contract. The Court of Claims concluded that it was "inherent or implied in the authority of the federal personnel acting in such emergency firefighting situations, to procure and use, on the spot, the necessary or appropriate fire-fighting supplies."); *Prestex, Inc. v. United States*, 162 Ct. Cl. 620, 628-30, 320 F.2d 367, 373-374 (1963) ("Even though a contract be unenforceable against the government, because not properly advertised, not authorized, or for some other reason, it is only fair and just that the government pay for goods delivered, or services rendered and accepted under it."); *Silverman v. United States*, 679 F.2d 865, 870 (Ct. Cl. 1982) ("Although the senior FTC official was not a contracting officer for the FTC, with expressly delegated authority to make contracts for the government, the FTC retained and utilized the transcripts which the plaintiff released to the FTC on the basis of the official's promise. By accepting the benefits flowing from the senior FTC official's promise of payment, the FTC ratified such a promise and was bound by it. . . . ").

In this case, as stated by the circuit court:

> . . . the Border Patrol, in the apparent lawful exercise of its authority, set in motion a chain of events which imposed significant costs upon the hospital. There can be little question but that these are costs incurred as a natural and foreseeable consequence of the conduct by the United States government in fulfilling its constitutional duties.

City of El Centro v. United States, 922 F.2d at 818. Despite the above, the circuit court determined that because, as triage was being performed in the hospital emergency room on the injured aliens at approximately 2:00 a.m. on the date of the crash, the hospital did not determine that the governmental representative promising the government would pay for the services had such authority, the hospital and the citizens of the City of El Centro should not be precluded from recovery for the services provided. As noted by Judge Rich in his dissent in this case, the reasons of the circuit court for reversing the Claims Court's judgment "seem to me an heroic effort by the majority to support the government's refusal to pay." *Id.* at 826. Such legal heroics are contrary to the strong public policy in favor of encouraging citizens to cooperate with the government in emergency situations. Such cooperation enables the government to perform its role in such circumstances and protect against injury to persons and property. The government should not be permitted to take advantage of its citizens in such situations.

In conclusion, such heavy-handedness by the government should not be tolerated. As stated by Judge Rich in his dissent:

> I would hazard the guess that the government has expended, in fighting this claim, many times

> the amount of assets that it would have taken to pay this claim. So much for the federal expenditures which so concern the majority.

Id. at 826.

CONCLUSION

The circuit court's opinion will perpetuate the conflict in the circuits regarding whether the activation of emergency lights on a police or other law enforcement vehicle, while pursuing another vehicle, constitutes a seizure or detention of the occupants of the vehicle. The circuit court's holding will also perpetuate a misinterpretation by the lower federal courts of this Court's decision in *Brower v. County of Inyo*, 489 U.S. 593, 109 S. Ct. 1378, 103 L.Ed.2d 628 (1989). Finally, the circuit court's holding works an injustice on petitioner and further confuses the issue of when the government can be held to payment agreements made by it in exchange for services needed in an emergency situation. This Court has not previously addressed that issue. For these reasons, petitioner requests that the Court accept review and reverse the decision below.

Respectfully submitted,

J. MARK WAXMAN
Counsel of Record
JAMES R. KALYVAS
WEISSBURG AND ARONSON, INC.
2049 Century Park East
Suite 3200
Los Angeles, California 90067
(213) 277-2223

Attorneys for Petitioner
City of El Centro

APPENDIX

CITY OF EL CENTRO,
Plaintiff-Appellee,

v.

The UNITED STATES,
Defendant-Appellant.

No. 90-5003.

United States Court of Appeals,
Federal Circuit.

Dec. 28, 1990.

J. Mark Waxman, of Weissburg and Aronson, Los Angeles, Cal., argued for plaintiff-appellee. Of counsel was James R. Kalyvas.

Stephen J. McHale, of Dept. of Justice, Washington, D.C., argued for defendant-appellant. With him on the brief were Stuart M. Gerson, Asst. Atty. Gen., and David M. Cohen, Director.

Before RICH and PLAGER, Circuit Judges, and DUPLANTIER, District Judge.*

PLAGER, Circuit Judge.

Plaintiff-appellee City of El Centro, State of California, owns and operates El Centro Community Hospital (ECCH). ECCH found itself treating 14 illegal aliens injured, some seriously, when the vehicle in which they were riding crashed while attempting to flee United States Border Patrol agents. The course of treatment of

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* The Honorable Adrian G. Duplantier, United States District Court for the Eastern District of Louisiana, sitting by designation.

these individuals incurred $183,263.64 in costs for ECCH. ECCH requested defendant-appellant United States Government to pay these costs. The Government refused to pay. The Claims Court found an implied-in-fact contract and granted relief to ECCH. *City of El Centro v. United States*, 16 Cl.Ct. 500, *reconsid. denied*, 17 Cl.Ct. 794 (1989). Despite the appealing nature of plaintiff's case, as a matter of law we reverse.

I. Background

Early in the morning of January 23, 1985, Boarder Patrol agents observed several vans parked on the American side of the border between the United States and Mexico, near El Centro, California. The vans were parked in an area known to be a rendezvous point for smugglers of illegal aliens. At about the same time, the Border Patrol had indications that a group of people was moving on foot in the general direction of the vans.

A short time later, the agents saw one of the vans traveling eastward on the highway. The agents followed in their vehicle, activating their emergency lights. The van did not stop and a high speed chase began. With the border patrol agents in hot pursuit, the van raced along California Highway 8. In an unsuccessful attempt to elude the pursuing agents, the van, still travelling at speeds in excess of 60 miles per hour, swerved off the highway and onto an exit ramp. Reaching the top of the ramp, the van failed to negotiate a turn and vaulting over an embankment, crashed, exploded and burned.

The pursuing agents quickly arrived at the crash scene, extinguished the flames and radioed for assistance.

Fourteen aliens in the van were taken by ambulance to ECCH for treatment. The driver and two of the passengers died in the accident.

Responding to the emergency call, ECCH prepared for the arrival of the injured aliens. Medical personnel as well as Assistant Director of Finance for ECCH, Kaye Fox, arrived at ECCH ahead of the injured aliens. Uniformed Border Patrol Agent Mario Hernandez also arrived at the hospital ahead of the injured aliens. The Claims Court found that when Ms. Fox asked Agent Hernandez who would pay for the treatment of the aliens, Agent Hernandez responded, "me and you" [sic]. Ms. Fox testified[1] that it was her understanding, based on her conversation with Agent Hernandez, that the Border Patrol would be responsible for the costs of hospitalization.

Agent Hernandez instructed the hospital to notify the Border Patrol prior to the release of any of the aliens so that each alien would be released from ECCH directly into the custody of the Border Patrol. While hospitalized, the aliens were photographed by Immigration and Naturalization Service (INS) investigators and had their medical records reviewed by an INS doctor visiting ECCH. At least one INS investigator also signed ECCH consent forms for those aliens unable to sign. The investigator signed on a line marked "Patient/Parent/Conservator/Guardian."

The Claims Court found that an implied-in-fact contract was created and that ECCH was entitled to recovery under that contract.

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[1] Ms. Fox's testimony was in the form of a videotaped deposition as she had died prior to trial.

II. Discussion

A.

The Constitution vests in the Federal Government the authority and responsibility to protect the integrity of the borders of the United States. U.S. Const. art. I, § 8; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659, 12 S.Ct. 336, 338, 35 L.Ed. 1146 (1891). In the course of implementing this responsibility, Congress has assigned the duty of apprehending aliens who illegally enter the country to the Attorney General. The Attorney General carries out this duty, in part, through the vehicle of the Border Patrol Division of the Immigration and Naturalization Service's Office of Enforcement. *See* 8 U.S.C. § 1103(a) (1988); 28 C.F.R. § 0.105 (1990); 8 C.F.R. § 100.2 (1990).

In this case, the Border Patrol, in the apparent lawful exercise of its authority, set in motion a chain of events which imposed significant costs upon the hospital. There can be little question but that these are costs incurred as a natural and foreseeable consequence of the conduct by the United States Government in fulfilling its Constitutional duties. As a matter of equity, there is a good argument that these costs should be assessed against all the taxpayers of the United States. The question before the court, however, is whether, as a matter of law, the United States is obligated to pay these costs, or whether, as it has chosen to do, the Government is free to let these costs fall upon ECCH and those whose obligation it is to support the hospital.

The Government is of the view that there is no legal basis under which the hospital can be reimbursed for these costs. It argues that there was no express or implied

contract for services that met the statutory requirements for contracting with the United States. The Government argues further that the injured aliens were neither in the Government's custody, nor had the Government assumed responsibility for their care.

ECCH argues that the Border Patrol's hot pursuit of these individuals was sufficient for a court to find that the aliens were in custody, and that as a result they were under the care of the Government so that the services rendered to them were the usual medical services rendered upon authorized request for persons in Government custody, and for which payment is statutorily provided. In the alternative, ECCH argues that the conduct of various INS agents in the course of these events created an implied-in-fact contract.

We review findings of fact from the Claims Court under the clearly erroneous rule. As regards the legal conclusions of the Claims Court, we will affirm the court's conclusions unless they are incorrect as a matter of law. Fed.R.Civ.P. 52(a); *Heisig v. United States*, 719 F.2d 1153, 1158 (Fed. Cir.1983).

B.

ECCH cites two statutes as the basis for its claim that the Government is mandated by law to pay these medical expenses. The Claims Court held neither to be applicable. Title 8, United States Code, section 1252(c) (1982), cited by ECCH, authorizes the Attorney General to expend funds for, *inter alia*, the operation of facilities for the detention of aliens against whom a final order of deportation has already been made. The Claims Court correctly

observed that the "plain language precludes its being read as a money-mandating provision." 16 Cl.Ct. at 504.

The other statutory section on which ECCH bases its argument is 42 U.S.C. § 249 (1982). Section 249(a) provides that "any person detained by [the Immigration and Naturalization Service], may be treated and cared for by the Public Health Service." When treatment is supplied outside of a Public Health Service facility or by other than Public Health Service personnel, § 249(c) provides:

> Persons whose care and treatment is authorized by subsection (a) of this section may, in accordance with regulations, receive such care and treatment at the expense of the [Public Health] Service from public or private medical or hospital facilities other than those of the [Public Health] Service, when authorized by the officer in charge of the [Public Health Service] station at which the application is made.

As the Claims Court noted, the problem with this provision from ECCH's viewpoint is that it does not *mandate* compensation, but simply provides authorization for payment when properly requested and authorized by the designated government agent. Furthermore, the parties appear to have misread § 249(c) by suggesting that the care and treatment of the aliens potentially authorized by that section is the responsibility of the Immigration and Naturalization Service rather than the Public Health Service. Section 201(a) states that "[t]he term 'Service' means the Public Health Service."

For the aliens in the present matter to fall within the ambit of § 249 authority, ECCH would have needed to show that application for payment was "authorized by

the officer in charge of the [Public Health Service] station" where that application was made. The record shows that discussions regarding payment involved Border Patrol Agent Hernandez and that claims for payment were submitted only to the INS, not to the Public Health Service.

The Claims Court found that "[n]o 'application' was made to a Public Health Service station nor approved by the 'officer in charge of the station.' " 16 Cl.Ct. at 504. We agree and therefore § 249 does not provide authorization for reimbursement of the expenses incurred by ECCH in treating the aliens.

C.

ECCH considered that, in addition to the statutory theory for recovery discussed above, it had an independent cause of action in contract. With regard to ECCH's argument that the contract was implied-in-law – that is, a restitutionary theory – the Claims Court held that Congress had not relinquished the Government's sovereign immunity with respect to implied-in-law contract obligations. 16 Cl.Ct. at 505. Neither party has disputed that holding in this appeal.

The Claims Court, however, agreed with ECCH that there was an implied-in-fact contract, obligating the Government to pay for the medical services rendered to the injured aliens. The Government disputes this holding. An implied-in-fact contract requires findings of: 1) mutuality of intent to contract; 2) consideration; and 3) lack of ambiguity in offer and acceptance. *Russell Corp. v. United States*, 210 Ct.Cl. 596, 537 F.2d 474, 482 (1976), *cert. denied*,

429 U.S. 1073, 97 S.Ct. 811, 50 L.Ed.2d 791 (1977); *Fincke v. United States*, 230 Ct.Cl. 233, 675 F.2d 289, 295 (1982). When the United States is a party, a fourth requirement is added: the Government representative "whose conduct is relied upon must have actual authority to bind the government in contract." *Juda v. United States*, 6 Cl.Ct. 441, 452 (1984) (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947)).

1.

The Government argues that it did not intend to enter into a contract and that Agent Hernandez did not have authority to bind the United States in contract. The Claims Court held that, as a matter of fact, the various discussions between employees of the Government and of ECCH when taken as a whole evidenced a sufficient meeting of the minds to establish mutuality of intent to contract. We cannot say that that finding is clearly erroneous.

With regard to the question of whether the Government's agents had authority to bind the Government in contract, ECCH argues: that Agent Hernandez was the Government official sent to ECCH to coordinate the situation; that the agent's supervisor, Agent Roy, knew of the discussion between Agent Hernandez and Ms. Fox; and, that because no Government representative did anything to dispel Ms. Fox's belief that the Government would pay the expenses incurred by the aliens, the supervisor, and therefore the Government, had ratified Agent Hernandez's statements and had bound the Government in contract.

The Claims Court concluded that it knew of "no statute, regulation or case which would preclude Agent Hernandez' exercise of government authority to obligate funds for emergency medical treatment of detainees injured during the course of apprehension." 16 Cl.Ct. at 508. But the issue is not whether some authority exists that prohibits Agent Hernandez from obligating the Government in contract; rather, the issue is whether Agent Hernandez had been granted the authority to affirmatively obligate the Government. No such authority has been cited by ECCH nor is such authority evident from the record.

The United States Government employs over 3 million civilian employees.[2] Clearly, federal expenditures would be wholly uncontrollable if Government employees could, of their own volition, enter into contracts obligating the United States. Regardless, ECCH argues that Agent Hernandez had authority to bind the Government in the instant matter. We disagree.

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.

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[2] M. Hoffman, *World Almanac and Book of Facts 1990* 106 (1990).

Federal Crop Ins. Corp. v. Merrill, 332 U.S. at 384, 68 S.Ct. at 3. Further, it is ECCH's responsibility to show that Agent Hernandez had the requisite contracting authority. *Housing Corp. of America v. United States*, 199 Ct. Cl. 705, 468 F.2d 922, 925 (1972).

The Claims Court believed this to be an emergency situation such as that described in *Halvorson v. United States*, 126 F.Supp. 898 (E.D.Wash.1954), where, following a three day Montana blizzard, the weight of snow on several partially-constructed government buildings threatened their safety. The local Corps of Engineers officer enlisted immediate assistance of others to save the buildings. He was held to have authority to obligate the Government to pay for such aid.

The present situation is not one in which emergency action must be taken by government agents to protect life and property, and an implied authority to obligate government resources is found. In terms of the medical needs of the injured aliens, Federal officials had no care-providing duties to perform. The hospital was preparing to attend to the injured aliens; the only question was payment. Even assuming the casual remark by Agent Hernandez could be considered a serious contractual undertaking on behalf of the Government, ECCH failed to meet its burden of showing authority to contract. It is reversible error for the trial court to have found such authority vested in Agent Hernandez.

Even so, ECCH argues, because Supervisor Roy was aware of the conversation between Ms. Fox and Agent Hernandez regarding payment for costs incurred by the aliens, and because no INS representative overtly sought

to dispel any possible misconception about such payments, some type of "institutional ratification" had occurred. Again, we disagree.

The Claims Court cited *Silverman v. United States*, 230 Ct. Cl. 701, 679 F.2d 865 (1982), as binding authority in this Circuit that permits a finding of *institutional* ratification. 17 Cl.Ct. at 798. *Silverman* was a suit by a subcontractor (a court reporter) against the Government for unpaid services he had performed, and which the Government acknowledged it had received. The contractor who had the contract with the Government to provide the stenographic services found itself in financial difficulty, at a time when, without having paid the subcontractor for his work, it had already received partial payment from the Government for the services. When plaintiff Silverman realized that his employer-contractor was in financial difficulties, he contacted a senior official of the Federal Trade Commission (FTC) for whom the services were being performed. That official, *who had authority to approve vouchers for payment for goods and services*, told plaintiff that if he would provide the remaining services and deliver the remaining transcripts, he would "see to it that the plaintiff received payment. . . . " *Silverman*, 679 F.2d at 868. And he did. He paid plaintiff some $7488.19 of the $10,091.71 plaintiff claimed was due him for all his as yet unpaid services; plaintiff sued for the balance due.

The court agreed that plaintiff as a subcontractor had no contract with the Government – "the subcontractor cannot properly maintain an action in such a situation" – but that an implied-in-fact contract arose, ratified by the action of the FTC in accepting the benefits flowing from the senior FTC official's promise of payment: "the FTC

retained and utilized the transcripts which the plaintiff released to the FTC on the basis of the official's promise." *Id.* at 869-70.[3]

By contrast, in the case before us there was no promise, certainly no express promise, by an official empowered to bind the Government to pay for the care rendered. ECCH has not shown that any individual with contracting authority exercised that authority to bind the United States in this matter.

2.

A second requirement for finding an implied-in-fact contract is consideration. The Government received none. ECCH argues that because the aliens were detained by the Government and because the Government is responsible for the care and treatment of such detainees,[4] the care given by ECCH to the aliens conferred a benefit on the Government and was thus consideration in an implied-in-fact contract.

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[3] The case took a curious twist. The court found that the implied-in-fact contract was only for those services for which the Government had not already paid the contractor. As a consequence, not only did plaintiff not get the balance for which he sued, but he had to return part of the money that the Government had paid him.

[4] The record reflects that the Government stipulated that it assumes responsibility for the care of suspected aliens taken into custody or detained by the Border Patrol. The exact authority under which the Department of Justice found the Government responsible for such care does not appear in the record.

The Government's responsibility to care for the aliens is set out in § 249. As previously noted, the language of § 249 is permissive – "any person detained by the [INS] *may* be treated and cared for . . . " (emphasis added) – rather than mandatory. Further, § 249 would only apply to the aliens if they were "detained" by the INS. The meaning of the term "detained" in § 249 is a question of law based on the underlying facts. In this case, the Claims Court found as a fact that at no time during the period at issue was physical custody taken of the aliens by INS. *City of El Centro v. United States*, No. 208-86C, bench ruling at 260-61 (Cl.Ct. Dec. 18, 1987). Nevertheless, the court held that the term encompassed a "de factor detention" which existed as a result of the conduct of the INS. 16 Cl.Ct. at 504.

In the absence of a statutory or judicial definition of "detained" as it is used in § 249, we look to analogous law. An area in which fact patterns comparable to this have arisen is search and seizure law, specifically, when government action, typically by police, results in the seizure of a person under the Fourth Amendment.

The Supreme Court has phrased the test of when the Government has "seized" someone in various ways: a meaningful interference with an individual's freedom of movement, or a willful governmental termination of an individual's freedom of movement through means intentionally applied. *See, e.g., Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989); *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984); *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Michigan v. Summers*, 452 U.S.

692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

In the recent *Brower* case, the issue was whether a high speed chase which ended in a crash constituted a seizure in violation of the Fourth Amendment. The police had employed a roadblock consisting of an 18 wheel tractor-trailer truck which completely blocked the two-lane road on which the fleeing driver was traveling. The chase terminated abruptly when the fleeing vehicle rounded a curve in the road and rammed into the truck, resulting in the death of the driver. The Court held that a Fourth Amendment seizure occurred: "A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful." *Brower*, 489 U.S. at 596, 109 S.Ct. at 1381 (citations omitted).

In reaching that conclusion, the Court emphasized that a governmental seizure requires an intentional acquisition of physical control. A seizure does not occur, said the Court, whenever there is a governmentally caused termination of an individual's freedom of movement, nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement, but only when there is a governmental termination of freedom of movement through means intentionally applied. (The concurring opinion, while joining in the judgment of the Court, disagreed with the majority's emphasis on the need for an intentional acquisition of physical control. *Brower*, 489 U.S. at 600-01, 109 S.Ct. at 1383-84.)

Thus, the Court noted, while the roadblock used by the County of Inyo resulted in a seizure, a police automobile chase in which the suspect unexpectedly loses control of his or her car would not be a seizure. *Id.* at 595, 109 S.Ct. at 1381. The analogy is apt. The INS pursuit of the fleeing vehicle which ended in the crash was insufficient to place the aliens in INS detention; to the extent the Claims Court's holding is to the contrary it is incorrect as a matter of law.

INS activity afte: the crash also fails to constitute a detention of the hospitalized aliens. That a Border Patrol agent was present at ECCH when the aliens were admitted was insufficient to place the aliens in INS detention. The understanding of both the hospital and the Border Patrol was that at the termination of each alien's hospitalization, ECCH would contact INC so that *at that time* INS could take custody of the individual aliens. The events here appear insufficient to constitute the Government's having "detained" the aliens either prior to or during their hospitalization. *Brower*, 489 U.S. at 596, 109 S.Ct. at 1381.

Because the aliens were not detained by the INS, § 249 does not provide authority for, much less create responsibility in, the Government to provide care for the aliens. Nor have the parties pointed to other statutory or regulatory language imposing such authority or responsibility. Because the Government was not required to provide care to the aliens, the care provided by ECCH benefited the aliens, not the Government. Therefore, the Government received no consideration to support an implied-in-fact contract.

D.

The dissent would find that custody and responsibility for the care and treatment of the aliens was taken by the Government at some undefined time after they arrived at the hospital, but before they were released into Government hands. *Brower* is said to be inapplicable on the facts, and dictum anyway. However, no alternative authority – either statutory or case – is offered for this contrary conclusion. That of course was the trial court's problem as well. Even if that problem were overcome, the dissent offers no basis for concluding that an application for reimbursement was ever filed with or approved by the Public Health Service in accordance with § 249.

Authority is offered for the dissent's conclusion that a contract remedy lies. The two cases cited are *Silverman v. United States*, 230 Ct.Cl. 701, 679 F.2d 865 (1982) and *Philadelphia Suburban Corp. v. United States*, 217 Ct.Cl. 705 (1978). *Silverman* was discussed above.

The *Philadelphia Suburban* case was one where again the Government received a direct benefit – the Government took and used plaintiff's firefighting foam to put out a fire on two ships that had collided. When the plaintiff sued to make the Government pay for what it took, the Government moved for summary judgment on the grounds that it had not contracted for what it took and therefore could not be made to pay. Not surprisingly, the court denied the Government's motion, and sent the case back for trial to see if plaintiff could develop "proof of a contract implied-in-fact arising from the totality of the circumstances." *Philadelphia Suburban*, 217 Ct.Cl. at 707.

In the case before us, ECCH had the opportunity to make its proof that the Government, given the totality of the circumstances, contracted, if not formally at least in fact, for the goods and services involved, and that these goods and services were for the benefit of the Government. In this, ECCH failed.

If this suit was against a party other than the Government, a court might sympathetically respond to the siren call of restitutionary relief, a contract "implied in law" as the euphemism goes. But, as the Claims Court recognized, the Government has long been held immune from such claims for relief. *United States v. Mitchell*, 463 U.S. 206, 218, 103 S.Ct. 2961, 2968, 77 L.Ed.2d 580 (1983) (citing *Merritt v. United States*, 267 U.S. 338, 341, 45 S.Ct. 278, 279, 69 L.Ed. 643 (1925)). Even when as harsh a result is called for as this seems to be, it is not for us to reverse that long standing doctrine. The alluring umbrella of "totality of the circumstances" and an implied-in-fact contract when the law does not permit it is not a satisfactory alternative to an absence of legal right. If a remedy is to be had in cases such as this, it must be provided by a branch of government empowered to grant it.[5]

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[5] Congress has established a variety of Federal programs providing financial assistance to hospitals. If there is to be a special program of relief for a hospital that provides services under the circumstances of this case, the Congress is in the best position to determine the nature of such a program, and its boundaries.

III. Jurisdiction

The Government argued that ECCH failed to file its claim pursuant to the requirements of the Contract Disputes Act (CDA). As a result, the Claims Court, in the Government's view, was without jurisdiction to hear the case. In view of the fact that we conclude that no contract existed between the Government and ECCH, it is unnecessary for us to determine whether a claim for breach of that alleged contract was properly filed. The Claims Court is thus without jurisdiction under the CDA count. Of course, jurisdiction still attached under the § 249 count.

IV. Conclusion

However compelling the hospital's claim may be, neither the Claims Court nor this court has been presented with a legal basis for relief. The judgment of the Claims Court is reversed.

REVERSED.

RICH, Circuit Judge, dissenting.

The question posed by this suit, which went to trial before Claims Court Judge Turner, sitting in San Diego near where the events occurred, is whether the costs of hospital treatment of 14 indigent, illegal aliens shall be borne by the local municipal hospital (ECCH), unfortunately located near the U.S. Mexican border, or by the U.S. Immigration and Naturalization Service (INS) which was effectively in charge of those injured aliens (whatever legal label is stuck on their status) during and after their hospitalization. It is undisputed that as they left the

hospital they went directly and involuntarily into INS "custody."

Judge Turner, after a post-trial oral opinion from the bench pointing out the many problems in reaching a decision on the sole question of who pays, wrote an extensive opinion and then a second opinion answering the government's arguments in support of its motion for reconsideration. He decided on the basis of extensive reasoning that INS should pay and adhered to that decision on reconsideration, adding supporting authority to his original opinion. I agree with his decision and to the reasoning in support of it.

As would be expected, government counsel raise every conceivable reason and legal argument against payment by the INS, which is their duty to their client and the public fisc, but I am not impressed. The reasoning of the majority does not convince me either. It states the factual background in skeletonized form but the flesh is to be found in Judge Turner's opinions and in the evidence. There are essentially no disputed facts. The government's Reply Brief states on page 2 that "we have taken care to limit our challenges to the legal determinations that the Claims Court made based upon its factual findings." These determinations, it says on the next page, "this court is free to review *de novo*." It then recites the three legal conclusions it chooses to attack, which are, briefly: (1) de facto custody of the aliens by INS; (2) the existence of an implied-in-fact contract that INS would pay; and (3) that, assuming applicability of the Contract Disputes Act (CDA), its provisions were complied with. My opinion is that on all three, Judge Turner's holdings are supported by the evidence and legally correct.

Most of the essential facts and many of the legal points are covered by the stipulations of the parties. Paragraph 2 of the stipulation reads:

> 2. Defendant, United States of America, through the Immigration and Naturalization Service ("INS") is responsible for the care of individuals taken into custody or detained by the United States Border Patrol as suspected aliens.

The majority would escape Judge Turner's conclusion on custody or *de facto* detention, as I read its opinion, by reliance on the Supreme Court decision in *Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). Apparently it turns to *Brower* and its ilk because it can find no case on a fact situation like that here. While I can agree that *Brower* has a bearing on whether the aliens were taken into custody or detained as of the moment the van crashed or solely as a result thereof, and that the crash did not create custody according to *Brower* dictum, that is unimportant. It was the subsequent INS conduct through the actions of numerous INS personnel that shows the custody or *de facto* detention through a continuing pattern of behavior. INS's behavior speaks more loudly than its counsel's words. Agent Hernandez was sent to the hospital before the ambulances with the aliens arrived, in effect saying "Be on notice these people are illegal aliens whom we, INS, are pursuing." Later, INS sent its photographers who took their pictures, signing some hospital forms in connection therewith on behalf of the aliens. INS sent its doctor to check on the aliens' condition, health, and the treatments the hospital was providing them. One alien who was well enough to walk out and did so surreptitiously was said to

have "escaped." One escapes *custody*, not a hospital. All this and more the majority describes with the single word "insufficient" with no support for that legal conclusion other than a citation to *Brower*.

I find *Brower* about as far afield from the factual situation of this case an one could get. That case involved a wrongful death action brought by the administrator and heirs of the deceased, one William Caldwell, on the legal theory that the Fourth Amendment prohibition of unreasonable seizures had been violated by a roadblock set up by the Inyo County police, against which Caldwell crashed to his death. The question was whether the complaint stated a claim. The district court held it did not and the Ninth Circuit affirmed by a divided court. The Supreme Court majority, after much discussion of other cases, hypothetical situations, the Fourth Amendment, and what is or is not seizure, reached the following decision:

> The complaint here sufficiently alleges that respondents, under color of law, sought to stop Brower [i.e., Caldwell] by means of a roadblock and succeeded in doing so. That is enough to constitute a "seizure" within the meaning of the Fourth Amendment.

I don't know how this helps either the government or the majority, considering what they make of other statements in *Brower* about what is *not* seizure, which are, of course, dicta. The Court continued:

> Accordingly, we reverse the judgment of the Court of Appeals and remand for consideration of whether the District Court properly dismissed the Fourth Amendment claim on the

> basis that the alleged roadblock did not effect a seizure that was "unreasonable."

Four justices joined the judgment but declined to join the majority opinion because, inter alia, there was too much dicta in it seemingly "designed to decide a number of cases not before the Court and to establish the proposition that '[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control'."

The present case does not involve seizure, unreasonableness, wrongful death, or the Fourth Amendment and the question is not the sufficiency of a complaint to state a case. It involves who shall pay hospital bills. *Brower* is no support for the government or the majority.

Respecting the majority's point "C", I of course agree there was no express contract, a point neither side argues, discussion of which is therefore superfluous. The majority accepts the INS argument that nobody involved in this case from INS had any authority to contract or at least that the hospital should name someone specifically. This is a convenient screen for the government to hide behind. As a legal proposition, I find ECCH's "institutional ratification" approach, as developed in Judge Turner's second written opinion on reconsideration, 17 Cl.Ct. at 797-798, more persuasive, including the Court of Claims decision in *Silverman v. United States*, 230 Ct.Cl. 701, 679 F.2d 865 (1982). That case is, of course, a binding precedent in this court.

I also agree with Judge Turner's conclusions about CDA compliance and its applicability.

Of course I agree with the majority that the hospital's case is "appealing," which I take to mean that the Claims

Court's judgment appeals to one's sense of justice. I depart from the majority in my inability to see any clear legal necessity for reversing the Claims Court's judgment. The stated reasons seem to me an heroic effort by the majority to support the government's refusal to pay. An equally plausible rationale can be presented in favor of supporting the decision of the Claims Court. The opinions of Judge Turner constitute such a rationale and cite authority in support of his conclusions, not only in *Silverman*, just mentioned, but also *Philadelphia Suburban Corp. v. United States*, 217 Ct.Cl. 705 (1978), and many other sources of "law."

As the majority opinion says, "the Border Patrol, in the apparent lawful exercise of its authority, set in motion a chain of events which imposed significant costs upon the hospital. There can be little question but that these are costs incurred as a natural and foreseeable consequence of the conduct by the United States Government. . . . " It goes even further in saying that "[a]s a matter of equity, there is good argument that these costs should be assessed against all the taxpayers of the United States." It then concludes, in effect, that the government, and we, are helpless because the legislators failed to foresee an emergency situation such as this and make a statutory provision for it with the result that there is no "law" under which we can affirm the Claims Court. Other courts have not been so helpless. I cannot agree that this case "is not one in which emergency action [had to] be taken by government agents to protect life. . . . " Clearly it was, and it should be treated accordingly. Of course, the government (INS at least) was benefitted by the hospital's care of its detainees.

I would hazard the guess that the government has expended, in fighting this claim, many times the amount of assets that it would have taken to pay this claim. So much for the federal expenditures which so concern the majority.

I would affirm the judgment.

CITY OF EL CENTRO, Plaintiff,

v.

UNITED STATES of America, Defendant.

No. 208-86-C.

United States Claims Court.

Aug. 7, 1989.

J. Mark Waxman, Los Angeles, Cal., argued, for plaintiff. With him on the opposition to defendant's motion for reconsideration or rehearing was James R. Kalyvas, Los Angeles, Cal.

Stephen J. McHale, Washington, D.C., argued, for defendant. With him on the motion for reconsideration or rehearing were Acting Asst. Atty. Gen., Stuart E. Schiffer and David M. Cohen, Washington, D.C.

OPINION ON RECONSIDERATION

TURNER, Judge.

In an opinion filed March 16, 1989, this court determined that plaintiff had established an implied-in-fact contract with the Immigration and Naturalization Service entitling it to compensation for medical care rendered to 14 illegal aliens. *City of El Centro v. United States,* 16 Cl.Ct. 500 (1989). On March 30, 1989, defendant filed a motion for reconsideration or rehearing. This opinion addresses defendant's motion.

The parties have briefed and argued the issues raised by defendant. For reasons set forth below, we conclude

that defendant's motion should be denied. Because the matters raised in defendant's motion merit discussion and analysis, this opinion supplements the court's March 16, 1989 opinion, with which familiarity is presumed.

I

In its motion for reconsideration or rehearing, the government argues that the court improperly awarded recovery under an implied-in-fact contract because plaintiff had abandoned its implied-in-fact contract claim prior to trial. Further, defendant asserts that plaintiff's case lacked an essential element of an implied-in-fact contract because of its failure to establish either (1) that the government actors on whose conduct the contract was based possessed authority to bind the government, or (2) that the conduct in question was nevertheless ratified by the government. Finally, defendant argues that plaintiff's implied-in-fact contract claim must be dismissed for failure to meet the jurisdictional prerequisites of the Contract Disputes Act, 41 U.S.C. §§ 601-613. Defendant seeks dismissal of the complaint, or, in the alternative, re-opening of the proceedings on the issues of authority and ratification.

II

A. *Abandonment of Implied-in-Fact Contract Claim*

Defendant's contention that plaintiff abandoned its implied-in-fact contract claim (which was explicitly set forth in the complaint) rests on assertions that (1) no mention of the implied-in-fact contract claim can be

found in the parties' "Joint Statement of Issues of Facts and Law to be Resolved by the Court" filed before trial and (2) trial proceeded solely on plaintiff's statutory theory. We conclude that an implied-in-fact contract theory was not abandoned by plaintiff.

While it is true that the parties' joint statement of issues filed pursuant to RUSCC, Appendix G, ¶15[1] does not contain an explicit statement of an implied-in-fact contract issue, several of the issues set forth in the parties' joint statement could pertain to a contract theory.

For example, the very first issue of fact listed by the parties was

> Whether any representative of the Immigration and Naturalization Service (INS) advised any representative of El Centro Community Hospital (ECCH) that ECCH would be reimbursed for medical care furnished to individuals injured in [the] automobile accident [that] follow[ed] the high speed chase by Border Patrol Agents . . . on or about January 23, 1985.

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[1] RUSCC, Appendix G, ¶15 provides in pertinent part:

> Issues of Fact and Law. . . . [T]he parties shall also file a joint statement setting forth the issues of fact and the issues of law to be resolved by the court. Issues should be set forth in sufficient detail to enable the court to resolve the case in its entirety by addressing each of the issues listed. The statement of issues shall control the admissibility of evidence at trial and evidence will be deemed to be irrelevant unless it pertains to one or more of the issues.

Joint Statement of Issues of Facts and Law to be Resolved by the Court at 1, ¶1. Similarly, listed as an issue of law was

> Whether the INS is responsible for reimbursement of medical expenses for ECCH's treatment of the injured fourteen individuals when the INS had reasonable suspicion that these individuals were illegal aliens, requested ECCH to contact the INS when the individuals were to be released and Border Patrol agents came to the hospital to take them into physical custody upon their discharge.

Joint Statement at 3, ¶4. These questions focus upon the significance of government actors' conduct in light of surrounding circumstances – the core concern of any implied-in-fact contract claim. *E.g., Algonac Mf'g Co. v. United States*, 192 Ct.Cl. 649, 678-74, 428 F.2d 1241, 1255 (1970); *DeRoo v. United States*, 12 Cl.Ct. 356, 361 (1987). It is concluded that it would be unfair to find an "abandonment" of plaintiff's contractual theory based on the parties' pretrial statement of issues.

Nor could it be said that trial proceeded solely on plaintiff's statutory theory. During his opening statement at trial, defense counsel invited the court to find that plaintiff had abandoned its contract theory, but the court declined this invitation. Before the first witness was sworn, the following exchange occurred between defense counsel and the court:

> [Government counsel]: Your Honor, just so I can clarify that, are you suggesting then that there might be some other theory rather than [42 U.S.C. §] 249 that might be involved in this case; is that what you're looking for?

> The Court: Well, I'm just sharing with you that I'm wondering if that isn't the case.
>
> [Government counsel]: Yes, sir.
>
> The Court: And it may be . . . [that] we all agree that [42 U.S.C. §] 249 just really isn't addressing the facts that occurred, whatever they turn out to be.
>
> [Government counsel]: Thank you, your Honor.

Trial Transcript at 20-21. During his closing argument, government counsel stated:

> In all honesty, your Honor, I thought that [the implied-in-fact contract] claim had been abandoned. I don't believe it's raised as an issue in the pre-trial statement but, *to the extent that it is an issue in the case,* and maybe I missed it but I don't remember it being an issue, but *to the extent that it is an issue in the case,* [there was no proof by plaintiff of authority to bind the government].

Tr. at 236. (Emphasis added.) Finally, upon the court's request for post-trial briefs on theories of recovery (transcript of April 28, 1988 status conference, pp. 20-21), the parties' briefs addressed both statutory and implied-in-fact contract theories.

In summary, because the implied-in-fact contract theory (1) was expressly raised in the complaint, (2) was never formally dismissed from the case, (3) remained applicable to the parties' statement of issues, (4) retained vitality (as recorded in the transcript) at the start of trial, (5) was supported by evidence presented at trial and (6) was one of the theories on which the court received post-trial briefing, the government's claim of abandonment is rejected.

B. *Authority to Bind the Government*

In the March 16 opinion, we stopped short of holding that Agent Hernandez possessed authority to obligate the government, finding instead that the issue "simply [did] not admit of an easy answer." *City of El Centro*, 16 Cl.Ct. at 509. However, citing *Halvorson v. United States*, 126 F.Supp. 898 (E.D.Wash.1954), we noted that

> Government officials who might not otherwise have authority to make arrangements and incur obligations on behalf of the government may be able to exercise such authority during an emergency so that immediate remedial action can be taken.

City of El Centro, 16 Cl.Ct. at 508.

In its opposition to the instant motion, plaintiff has cited a case which reinforces this principle: *Philadelphia Suburban Corp. v. United States*, 217 Ct.Cl. 705 (1978). In *Philadelphia Suburban*, a collision of two tankers on the Delaware River resulted in an oil fire. The U.S. Coast Guard, acting through an officer and two enlisted men, first assisted and later directed local firefighters in fighting the blaze. In the course of battling the flames, the firefighters used a substantial amount of plaintiff's firefighting foam. When plaintiff subsequently requested payment for the foam, the government refused, asserting that "none of the Coast Guard personnel at the fire had any [government] authority to contract, either expressly or impliedly, for any use of the foam." *Philadelphia Suburban*, 217 Ct.Cl. at 706-7. The Court of Claims remanded for trial, declaring:

> [I]t may turn out, when the facts and circumstances are fully canvassed, that it was inherent

> or implied in the authority of the federal personnel acting in such emergency firefighting situations to procure and use on the spot the necessary or appropriate fire-fighting supplies.

Philadelphia Suburban, 217 Ct.Cl. at 707.[2]

The Court of Claims' reasoning in *Philadelphia Suburban* provides support for holding that the emergency situation cloaked Agent Hernandez with authority to obligate appropriate funds for the emergency medical treatment of the INS detainees in this case. Given the emergency situation, the finding of *de facto* detention, the existence of Congressionally-appropriated funds for INS detainees' emergency medical care, and the strength of the *Philadelphia Suburban* holding, it is concluded that such authority was inherent in, and a necessary and integral part of, Agency Hernandez' authorized duties.[3]

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[2] On remand, the trial judge concluded that although Coast Guard firefighters on the scene had authority to *use* the foam, they did not have authority to *contract for the purchase* of the foam. *Philadelphia Suburban Corp. v. United States*, No. 446-75, slip opinion at 16 (Ct.Cl. March 6, 1981). Nevertheless, the trial judge found that the government's actions constituted a Fifth Amendment taking which entitled plaintiff to compensation. Slip opinion at 11-12. In accordance with the subsequent stipulation of the parties, the Court of Claims entered judgment for plaintiff. *Philadelphia Suburban Corp. v. United States*, 229 Ct.Cl. 600 (1981).

[3] During oral argument, government counsel urged that the language of *Philadelphia Suburban Corp. v. United States*, 217 Ct.Cl. 705 (1978) indicates that more facts are needed before authority could be found in this case. While it is true that the *Philadelphia Suburban* court remanded so that "the facts and

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C. *Ratification*

In the March 16 opinion, we held that even if Agent Hernandez lacked authority to bind the government, his actions were nevertheless ratified by INS. *City of El Centro*, 16 Cl.Ct. at 509. The government asserts that ratification can be effective only if such ratification is by an official possessing authority to contract on behalf of the United States. Further, defendant urges that "a particular individual must be identified as the ratifying official and some exploration must be made of his knowledge." Def. Motion for Reconsideration or Rehearing at 7. The sole case which defendant cites on this point does not require such a rule here.[4] Instead, there exists binding authority

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circumstances [could be] fully canvassed," *Philadelphia Suburban Corp.*, 217 Ct.Cl. at 707, trial had not yet been held at the time the trial court had issued its ruling. In the instant case, by contrast, trial has already been held and the facts and circumstances pertinent to the emergency situation as well as to any inference of Agent Hernandez' inherent authority to deal with it *have* been "fully canvassed." *Id.*

[4] *Consortium Venture Corp. v. United States*, 5 Cl.Ct. 47, 51 (1984), *aff'd*, 765 F.2d 163 (Fed.Cir. 1985) hinged its discussion of ratification wholly upon 41 C.F.R. § 1-1.405 (1984) ("Ratification of unauthorized contract awards"), a provision which was superseded when the Federal Acquisition Regulations (FAR) went into effect on April 1, 1984 and which thereafter applied only to contracts formed prior to April 1, 1984. *See* 50 *Federal Register* 26987-88 (July 1, 1985). The original FAR did not contain any similar provision; indeed, no like provision appeared in the FAR until February 1988 when 48 C.F.R. § 1.602-3 ("Ratification of unauthorized commitments") became effective. Hence, even assuming the FAR applied to

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in this Circuit that permits a finding of *institutional* ratification. *Silverman v. United States*, 230 Ct.Cl. 701, 710, 679 F.2d 865, 870 (1982). Institutional ratification occurred in this case.

In *Silverman*, a senior Federal Trade Commission (FTC) official, whom the court recognized as lacking authority to obligate the government in contract, advised a court reporting company that if it delivered certain transcripts to FTC, then FTC would pay the company for the transcripts. The transcripts were delivered, but FTC refused to pay for them. The Court of Claims held that FTC was liable for the cost of the transcripts based on an implied-in-fact contract. The lack-of-authority problem was cured by ratification: "By accepting the benefits flowing from the senior FTC official's promise of payment, *the FTC ratified* such promise and was bound by it." *Silverman*, 230 Ct.Cl. at 710, 679 F.2d at 870 (emphasis added).

It would be difficult to read the Court of Claims' phrasing ("the FTC ratified") as anything other than a finding that the FTC *as an institution* ratified the contract; this court is persuaded, therefore, that it is legally possible for a government agency to ratify an otherwise technically unauthorized commitment and that a particular ratifying official possessing contractual authority need not necessarily be identified in order to show ratification.

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this contract, defendant's proposed ratification rule would still not govern, since FAR contained no provision respecting ratification that was effective at the time this contract was formed.

Apart from its holding that institutional ratification is possible in the government contracts area, *Silverman* also stands for the principle that *acceptance of benefits* can constitute ratification and thus render enforceable an otherwise defective government contract. Many cases echo this principle, *e.g., United States v. Amdahl Corp.*, 786 F.2d 387, 393 (Fed.Cir.1986); *Philadelphia Suburban*, 217 Ct.Cl. at 707; *Prestex, Inc. v. United States*, 162 Ct.Cl. 620, 628-30, 320 F.2d 367, 373-74 (1963); *New York Mail & Newspaper Transp. Co. v. United States*, 139 Ct.Cl. 751, 154 F.Supp. 271, *cert. denied*, 355 U.S. 904, 78 S.Ct. 332, 2 L.Ed.2d 260 (1957). In this case, there can be no dispute that INS and the Border Patrol accepted the benefits flowing from their agents' legally-significant conduct. Accordingly, "ratification by acceptance of benefits" is added to the ratification by silence, inaction, and confirming conduct that this court found in its original opinion. *City of El Centro*, 16 Cl.Ct. at 509.[5]

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[5] During oral argument, defense counsel protested that the ratification-through-acceptance-of-benefits cases are actually implied-in-law contract cases which introduce inconsistency into the otherwise strong principle that the United States cannot be sued on obligations implied-in-law. We find no inconsistency. Those cases (and this one) consider the government's acceptance of benefits *only* for purposes of determining whether the *authority element* of the implied-in-fact contract has been satisfied through ratification. All the other elements of an express contract must also be established before recovery can be had. This renders such cases readily distinguishable from implied-in-law contracts, where recovery derives *solely* from the conferral of a benefit, and the usual contractual element of mutual assent need not be shown. *Aetna Casualty & Surety Co. v. United States*, 228 Ct.Cl. 146, 164, 655 F.2d 1047, 1059-60 (1981); *Collins v. United States*, 209 Ct.Cl. 413, 424, 532 F.2d 1344, 1351 (1976); Restatement of Contracts 2d § 4 Comment b; *see also* Restatement of Restitution §§ 112-117.

D. *Contract Disputes Act*

Defendant contends that this court's March 16, 1989 opinion and order was void for lack of jurisdiction insofar as it addressed plaintiff's implied-in-fact contract claim, since plaintiff never fulfilled the jurisdictional prerequisites of the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. Plaintiff counters that the CDA does not apply to its contract claim but that even if it does apply, its requirements have been met.

1. *Applicability of the CDA*

By its terms, the CDA applies to "any . . . implied contract . . . entered into by an executive agency for . . . the procurement of services." 41 U.S.C. § 602(a)(2). This clear statutory language covers the instant contract. The authorities cited by plaintiff for a contrary conclusion are distinguishable.[6] Accordingly, unless plaintiff has satisfied the jurisdictional prerequisites of (1) submitting

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[6] In each case cited, the court expressly found that the contract at issue was not for the procurement of goods or services. In *Busby School of Northern Cheyenne Tribe v. United States*, 8 Cl.Ct. 596, 600 (1985), the contracts were "grant or sociological type contracts designed to accomplish government social policy goals." In *Newport News Shipbuilding & Dry Dock Co. v. United States*, 7 Cl.Ct. 549 (1985) and *Delta S.S. Lines, Inc. v. United States*, 3 Cl.Ct. 559 (1983), the contracts were for government subsidy of shipbuilding, pursuant to statute, in exchange for possible governmental use of the ships in time of war or national emergency. And the contract at issue in *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed.Cir.1983) was an implied contract to consider bids fairly and honestly.

each claim to the contracting officer in writing, (2) certifying any claim over $50,000, and (3) awaiting a decision or deemed decision thereon, this court would lack jurisdiction over plaintiff's implied-in-fact contract claims. 41 U.S.C. § 605; *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1339 (Fed.Cir.1983); *Paragon Energy Corp. v. United States*, 227 Ct.Cl. 176, 184, 645 F.2d 966, 971 (1981); *Acousti Engineering Co. v. United States*, 15 Cl.Ct. 698, 700 (1988). *See also Claude E. Atkins Enters., Inc. v. United States*, 15 Cl.Ct. 644, 646 (1988); *Rider v. United States*, 7 Cl.Ct. 770, 775 (1985), *aff'd*, 790 F.2d 91 (Fed.Cir.1986) and cases therein cited.

2. *Submission of a "Claim" to "the Contracting Officer"*

Defendant's contention that plaintiff never submitted a claim to the contracting officer rests on assertions that (1) plaintiff submitted mere invoices, and mere invoices are not CDA "claims," (2) defendant's letters denying liability contain no reference to any alleged contract, and (3) nothing in the record suggests plaintiff submitted anything to, or even contacted, any government contracting official.

The CDA provides: "All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for decision." 41 U.S.C. § 605(a). As this court has noted, "[n]either the CDA nor its legislative history contains a specific definition of the term 'claims.' " *Z.A.N. Co. v. United States*, 6 Cl.Ct. 298, 304 (1984). However, in construing that term, the Federal Circuit has stated:

> We know of no requirement in the [CDA] that a 'claim' must be submitted in any particular form or use any particular wording. All that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.

Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586, 592 (Fed.Cir.1987).

Defendant furnishes no binding authority for its assertion that invoices can never be CDA "claims." The cases defendant cites for this proposition are based not on a CDA definition of "claims" but on definitions found (1) in the disputes clauses of particular contracts or (2) in non-binding regulations. *Gardner Machinery Corp. v. United States*, 14 Cl.Ct. 286, 291-92 (1988); *Esprit Corp. v. United States*, 6 Cl.Ct. 546, 548 (1984), *aff'd*, 776 F.2d 1062 (Fed.Cir.1985); *Z.A.N. Co.*, 6 Cl.Ct. at 304 n. 11. Moreover, the Federal Circuit recently declined a government invitation to find that invoices are not "claims" under the Act. *Contract Cleaning Maintenance, Inc.*, 811 F.2d at 593.

In any event, it is evident that plaintiff submitted more than "mere invoices" in this case. Although the record is devoid of plaintiff's claim letters, it is clear from the reply letters – which are deemed to be decisions of the INS – that plaintiff had made claims for final payment for the medical services it rendered to patients who had been injured in the course of apprehension by the Border Patrol. The reply letters, which were all identical save the name of the patient involved, stated as follows:

This letter is to advise you that the United States Border Patrol and/or the Immigration and Naturalization Service is not responsible for any medical expenses incurred by *[name of patient]*. To the best of my information the Border Patrol's only involvement was as a 'good [S]amaritan' in calling an ambulance on behalf of *[name of patient]* to the scene of the accident. Pursuant to 28 U.S.C. [§] 1274, the United States Government is liable for tort claims in the same manner and to the same extent as private individuals. For the United States to be liable, in tort, there would have to be negligence on the part of their agents. In the present case, the United States did not cause the injury by any negligent act or omission and therefore would not be liable under the Federal Tort Claims Act, 28 U.S.C. [§] 2674.

The Immigration and Naturalization Service is not responsible for the medical care of aliens within the United States. The *only* exception to this rule is an alien in custody, where Congress has provided authority to provide such medical care. 42 U.S.C. [§] 249(c). The Congress of the United States appropriates funds to governmental agencies. These appropriations specify the usages to which these funds may be put. The Immigration and Naturalization Service, therefore, may not lawfully expend funds from its appropriation to reimburse state, local or private hospitals for funds expended by them in circumstances where the Immigration and Naturalization Service is not responsible.

I must, therefore, refuse to entertain your *claims*. If you have any information to suggest a basis for liability pursuant to the principles discussed herein, that information should be communicated to this office and it will be reviewed.

Plaintiff's Trial Exhibits 22 and 41-50 (emphasis added). Each reply letter was signed by the Regional Commissioner of the INS.

Defendant urges that because the reply letters discuss only liability based on tort or statute and lack any mention of a contractual basis of recovery,[7] plaintiff must not have provided "adequate notice of the *basis* . . . of [its] claim." *Contract Cleaning Maintenance, Inc.*, 811 F.2d at 592 (emphasis added). This contention is rejected. Each reply letter was clearly intended as a comprehensive denial of governmental liability for the services rendered – a suitable response to an unrestricted demand for payment. Use of the phrase "the *only* exception" suggests that INS had considered all legal bases of liability and rejected them all. It appears that INS "was not at all confused as to the nature of what was being requested." *Paragon Energy Corp.*, 227 Ct.Cl. at 192, 645 F.2d at 976. Certainly there was no confusion in identifying the episode from which plaintiff's request originated. Under these circumstances, it is concluded that plaintiff gave the government "adequate notice of the basis and amount of [its] claim," *Contract Cleaning Maintenance, Inc.*, 811 F.2d at 592, and therefore did submit "claims" within the meaning of the CDA.

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[7] The letters' failure to give plaintiff notice of his rights under the CDA (as required by 41 U.S.C. § 605(a)) is of some legal significance. The significance is not, however, what defendant suggests, i.e., that plaintiff must never have submitted a CDA "claim." Rather, it simply means that the reply letters could not trigger the running of CDA's one-year limitations period against plaintiff. *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1578 (Fed.Cir.1987).

Nor has defendant persuaded that plaintiff failed to submit its claim "to the contracting officer." 41 U.S.C. § 605(a). The contract involved in this case was an implied-in-fact contract; in the typical implied-in-fact contract situation (except when related to consideration of bids), there never would be a contracting officer designated by that title. In such a situation, all that a contractor could fairly be expected to do would be to submit its claim to the official designated by the agency for submission of that claim. Here there was uncontested testimony at trial that INS identified a particular official as "the one to determine payment." Tr. at 47, Plaintiff duly submitted its claims to that official. Accordingly, it is concluded that plaintiff satisfied CDA's requirement that claims be submitted "to the contracting officer." 41 U.S.C. § 605(a).

3. *Decision by the Contracting Officer*

Before this court can exercise jurisdiction over a contract claim covered by CDA, the claim must have been the subject of a contracting officer's final decision. *Conoc Constr. Corp. v. United States*, 3 Cl.Ct. 146, 147 (1983) (citing cases). Based on the reasoning set forth in section 2 above, we deemed defendant's reply letters to be final decisions of the contracting officer for purposes of this requirement.

4. *Certification*

Defendant contends that plaintiff's claims constitute a "unitary claim" in an amount over $50,000 and thus trigger CDA's certification requirement. With respect to certification, the CDA provides:

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

41 U.S.C. § 605(c)(1). It is well-established that lack of proper certification, where required, deprives this court of jurisdiction to proceed on a contract claim. *Tecom, Inc. v. United States*, 732 F.2d 935, 937 (Fed.Cir.1984); *W.M. Schlosser Co.*, 705 F.2d at 1337-38; *Arlington Alliance, Ltd. v. United States*, 231 Ct.Cl. 347, 357, 685 F.2d 1353, 1359 (1982); *Skelly & Loy v. United States*, 231 Ct.Cl. 370, 372, 685 F.2d 414, 416 (1982). Moreover, where, as here, there are several claims which taken together exceed $50,000 but taken separately do not, "the claims must be carefully examined to determine whether they are separate and individual claims not requiring certification, or merely portions of a single, unified 'claim' which . . . must be certified." *Walsky Constr. Co. v. United States*, 3 Cl.Ct. 615, 618 (1983).

The test for whether separate claims should be deemed "unitary" for certification purposes focuses upon whether the claims "are so related to one another that they form parts of a whole." *Walsky Constr. Co.*, 3 Cl.Ct. at 618, *quoting Warchol Constr. Co. v. United States*, 2 Cl.Ct. 384, 389 (1983). In applying this test, courts have given great weight to the manner in which a litigant treated his claims both at the agency level and in his complaint. *Black Star Security, Inc. v. United States*, 5 Cl.Ct. 110, 116-17 (1984) ("plaintiff has . . . belatedly attempted to fragmentize its claim. From the . . . record . . . it is clear that

plaintiff treated its claim as a single one until the filing of defendant's motion to dismiss"); *Palmer & Sicard, Inc. v. United States*, 4 Cl.Ct. 420, 422 (1984) ("plaintiff submitted to the contracting officer a single claim. . . . The letter submitting the claim stated in the first sentence that 'Our claim . . . is attached with schedules' "); *Warchol Constr. Co.*, 2 Cl.Ct. at 390 (plaintiff "characteriz[ed] the damaged items as part of a single claim in its amended complaint"); *Fidelity & Deposit Co. of Maryland v. United States*, 2 Cl.Ct. 137, 144 (1983) ("letters [to the contracting officer] clearly establish that plaintiff . . . dealt with [its] package of demands in terms of a single claim").

In this case, plaintiff submitted fourteen separate claims to INS for the medical expenses related to fourteen different patients. No single bill exceeded $50,000. Defendant replied to these claims by sending fourteen separate denial letters. Further, in its complaint, plaintiff requested "reimbursement in the amount established by the hospital *bills* for those *fourteen*" patients for whom it had provided treatment. Complaint at 3 (emphasis added). Since plaintiff did not treat its claims as unitary at the agency level or in its complaint, the instant case is distinguishable from *Black Star, Palmer, Warchol* and *Fidelity*.

Nevertheless, two judges of this court have held that

> [i]n determining whether separately stated claims are to be deemed unitary for certification purposes, neither the language employed by the contractor in making them, nor how they are organized, governs. What is vital is whether the demands arose out of essentially interrelated conduct and services, and the same or closely connected facts.

Walsky Constr. Co., 3 Cl.Ct. at 619; *accord Warchol Constr. Co.*, 2 Cl.Ct. at 389. Here, defendant asserts that plaintiff's claims for the cost of fourteen patients' medical care arose out of the same facts – that there was "a close and significant relationship between the ostensibly separate claims here." Transcript of 6/22/89 Oral Argument at 13. Moreover, defendant argues,

> The dispute isn't, are we liable for the medical bills of one particular alien; it is whether we are liable for the medical bills of all 14. It is one dispute. It is one claim and it is a claim in excess of $50,000 and it requires certification.

Tr. of 6/22/89 Oral Arg. at 14-15.

Close reading of *Walsky* and *Warchol* suggests, however, that their "unitary claim" findings rested on more than a mere interrelationship of underlying facts. Both cases involved construction contracts. In *Walsky*, plaintiff's claims arose from its repair work on one ski lift. 3 Cl.Ct. at 619. In *Warchol*, plaintiff's claims "flowed from the same differing site condition." 2 Cl.Ct. at 389. In both cases, the claims were "so interrelated that separating them [would have] serve[d] only to confuse if not mislead" and therefore could "be understood and disposed of properly only if considered together, and as one." *Walsky Constr. Co.*, 3 Cl.Ct. at 619. In this case, by contrast, viewing plaintiff's separately-submitted claims as separate would neither confuse nor mislead. Further, given plaintiff's consistent treatment of its claims as separate, plaintiff cannot be accused of having "belatedly attempted to fragmentize its claim" in order to avoid the certification requirement. *Black Star Security, Inc.*, 5 Cl.Ct.

at 116. Accordingly, we are not persuaded by defendant's "unitary claim" argument.

III.

For the reasons stated, defendant's motion for reconsideration or rehearing is DENIED.

CITY OF EL CENTRO, Plaintiff,

v.

UNITED STATES of America, Defendant.

No. 208-86-C.

United States Claims Court.

March 16, 1989.

James R. Kalyvas, Los Angeles, Cal., for plaintiff; J. Mark Waxman and Paul Gustav Neumann, Los Angeles, Cal., of counsel.

Stephen J. McHale, with whom were Asst. Atty. Gen. John R. Bolton, David M. Cohen and Thomas W. Petersen, Washington, D.C., for defendant.

OPINION AND ORDER

TURNER, Judge.

The City of El Centro, California, as owner and operator of El Centro Community Hospital (ECCH), claims entitlement to compensation from the Immigration and Naturalization Service for medical care rendered to 14 illegal aliens. The aliens had been injured in an accident following a high-speed chase initiated by agents of the Border Patrol. El Centro seeks payment of $183,263.64 in medical bills, plus interest, under 8 U.S.C. § 1252(c) and 42 U.S.C. § 249, or, alternatively, under an alleged implied-in-fact contract.

The case was tried in San Diego on December 17 and 18, 1987. At the conclusion of trial, the court found, *inter*

alia, that the hospitalized aliens were *de facto* detainees of the INS. This opinion addresses issues argued in post-trial briefs and supplements the findings announced from the bench on December 18, 1987 (trial transcript pp. 257-273), which were memorialized in an order entered December 21, 1987.

The parties have briefed the issues presented by both the statutory and the contractual theories of recovery. With respect to recovery based on statute, defendant urges that there exists no Constitutional provision, statute or regulation that can fairly be interpreted as mandating compensation of plaintiff for the medical care provided in this case. With respect to the question whether plaintiff is entitled to recover under an implied-in-fact contract theory, the government asserts (1) that any contract claim in this case must be implied-in-law, not implied-in-fact, and thus outside this court's jurisdiction, and (2) that in any event the officials on whose conduct plaintiff relies to support its contract claim lacked authority to bind the government.

For reasons set forth below, the court finds that plaintiff's statutory theory does not afford a basis for recovery but that plaintiff has established an implied-in-fact contract and is entitled to recover on that basis.

I. FACTS[1]

At approximately one o'clock on the morning of January 23, 1985, agents of the Border Patrol observed a van

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[1] The facts set forth here were derived from joint stipulations of the parties, findings announced in open court, and such evidence and testimony as was uncontested at trial.

parked on the American side of the boundary between the United States and Mexico near El Centro, California. The van was parked at a location which was notorious to the Border Patrol as a rendezvous point for alien smugglers and persons who had crossed the border illegally. At about the same time, Border Patrol sensors indicated that a large group of persons was moving on foot in the direction of the van.

Shortly thereafter, agents observed the van leaving the area. Two Border Patrol agents followed in their cruisers, activating their red emergency lights. The driver of the van refused to stop, and a high-speed chase ensued.

After having been pursued for some distance on California's Highway 8, the van, still travelling at speeds in excess of 60 miles per hour, turned onto an exit ramp. Unable to negotiate the ramp's curve at that speed, the van vaulted over an embankment, crashed, exploded and began to burn. The two agents in pursuit quickly arrived at the crash scene, extinguished the flames, and radioed for help.

All nineteen of the persons inside the van had entered the United States illegally. The driver and two of the passengers died in the crash. Many of the survivors were grievously injured; all were unable to leave the scene under their own power. Fourteen of the aliens were taken by ambulance to El Centro Community Hospital for treatment.[2] (Trial testimony established that, were it not

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[2] The other two surviving aliens were taken to another hospital, and the cost of their care is not the subject of this litigation.

for their physical condition, the survivors would have immediately been taken into physical custody and ultimately deported by INS.)

El Centro Community Hospital received warning that accident victims were on their way and began to prepare for their arrival. ECCH had established procedures for handling such disasters. Pursuant to these procedures, additional medical personnel were summoned to ECCH to assist in treating the incoming wounded. In addition, two ECCH officials, Kaye Fox and Jay Comstock, received telephone calls at home, advising them that there had been a grievous accident and that injured persons were en route to ECCH. As Assistant Director of Finance, it was Fox's responsibility to coordinate the triage and admission of the patients. Comstock, who was the hospital's administrator, had supervisory responsibility over ECCH's handling of the disaster. Comstock, Fox and a number of medical personnel arrived at ECCH ahead of the injured aliens.

Meanwhile, Supervisory Border Patrol Agent Douglas Roy ordered Agent Mario Hernandez to proceed to ECCH and, *inter alia*, gather information on the names, dates and places of birth, and medical conditions of the aliens. Agent Hernandez was dispatched to the hospital before the aliens arrived and reached the hospital ahead of them. Although he had not participated in the high-speed chase, Agent Hernandez was aware of the facts leading to the accident. Moreover, Agent Hernandez was wearing his Border Patrol uniform on which his badge was displayed.

At the hospital, Agent Hernandez identified himself as a Border Patrol Agent. He then informed Kaye Fox that the Border Patrol had been in pursuit of the van involved in the accident. Exactly what happened next is the subject of some disagreement. On this issue, the court heard testimony at trial from Kaye Fox, Jay Comstock and Agent Mario Hernandez.[3] The testimony of all three witnesses established that a further conversation took place between Fox and the uniformed Agent Hernandez just as the injured aliens were being admitted to ECCH. In that conversation, Fox identified herself as ECCH's financial officer. She then asked Agent Hernandez who was responsible for payment of the cost of the aliens' care.[4] According to Agent Hernandez, when Fox asked him who would pay, his response was "Me and you." At trial, Agent Hernandez explained that in saying this, he meant "the taxpayers" as distinct from "the Government or the Agency."

Agent Hernandez added that he told his immediate supervisor of his conversation with Kaye Fox. Specifically, Agent Hernandez testified that he informed Supervisory Border Patrol Agent Douglas Roy by telephone

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[3] Fox's testimony was in the form of a videotaped deposition, as she had died of cancer prior to the date of trial.

[4] The testimony conflicts as to how Agent Hernandez responded. According to Fox and Comstock, Agent Hernandez replied that the INS was responsible and would pay the bill since the injured aliens were in the custody of the Border Patrol. Resolution of the conflict is not essential to a decision in this case since, as explained in text, even accepting defendant's understanding of the objective facts, an implied-in-fact contract resulted.

from the hospital that ECCH financial officer Fox had raised the concern of who would pay and he had responded, "Me and you." Despite the susceptibility of this response to varying interpretations, the government presented no evidence or testimony that there was any subsequent INS effort to clarify it.

In addition to the discussion of payment, Agent Hernandez had further interaction with hospital personnel during his visit there on the night of the accident. An ECCH nurse brought Agent Hernandez a Guatemalan passport which belonged to one of the injured aliens;[5] Agent Hernandez took possession of the passport and signed for it. Agent Hernandez obtained information on each of the alien patients as his supervisor had directed; in addition, he informed a nurse that as soon as any of the aliens was ready to be released from ECCH, such alien was to be released to the custody of the Border Patrol. A nurse then notified Agent Hernandez that one of the aliens had minor injuries and was likely to be released in the morning; after conferring with his supervisor by telephone, Agent Hernandez instructed the nurse to call the Border Patrol when the alien was ready to be released, and said that the Border Patrol would come for him.

On the morning after the accident and continuing into the ensuing days, a number of other Border Patrol and INS officials came into contact with ECCH concerning the aliens. On the morning of January 23, Donald L.

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[5] The passport belonged to Cesar Augusto Flores de Leon, who, although initially admitted to ECCH, was air-lifted to University Hospital in San Diego that same night.

Davis, Officer-in-Charge of the El Centro Border Patrol station, telephoned Kaye Fox and requested that she notify the Border Patrol when any of the aliens was about to be released. On January 23 and 24, two INS investigators, Mel Gray and R.E. Novak, visited ECCH and took photographs of the aliens. Several of the aliens were unable to sign ECCH's required consent form; Investigator Novak signed the forms on behalf of these aliens on a line marked "Patient/Parent/Conservator/Guardian." In addition, an INS physician, Dr. Pavlik, visited ECCH and secured the release of the aliens' medical records. Kaye Fox's uncontested testimony was that Dr. Pavlik stated he was "responsible for medical follow-up to make sure [ECCH] doctors were taking care" of the aliens, and that he would be working with the ECCH doctors as a "consultant" or "referring physician" during the aliens' treatment.

Further, each time an alien patient became ready for release from hospitalization, ECCH personnel informed the Border Patrol, which then sent agents who took the alien into physical custody.[6] The only exception was Miguel Perez-Lopez who surreptitiously left the hospital on or about January 26. But even as to Lopez, ECCH communicated with INS. An internal Border Patrol memorandum on this subject, written by Agent Jeffrey Parsons to Officer-in-Charge Davis, stated:

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[6] The last alien patient to be released from hospitalization was Olga Cerrito-Escobar, discharged March 18, 1985, more then seven weeks after the accident. (Plaintiff's trial exhibit 21).

> At 12:05 p.m. on January 26, 1985[,] I received a call from the Charge Nurse, Debbie Eugenio, from El Centro Community Hospital. She stated that one of *our* injured aliens was missing and they presumed that he had *escaped*.

(emphasis added). Furthermore, Officer Davis testified that he had entered the notation "escape" next to Lopez' name on a Border Patrol list.

Finally, it should be noted that within hours of their admission to ECCH, Kaye Fox wrote two memoranda on the subject of the aliens, one to the nursing staff, the other to Jay Comstock, ECCH administrator. These memoranda were received in evidence. In them, Fox manifested her understanding that (1) the aliens were "in custody" of the INS, and (2) the INS had assumed payment responsibility for their care.

When ECCH presented invoices to INS for the aliens' medical care, INS refused payment. INS' letter denying liability gave three grounds: (1) There had been no injury-causing negligence on the part of the Border Patrol, (2) the injured aliens had not been in custody when hospitalized, and (3) Border Patrol agents' only involvement was an "good Samaritans" in calling an ambulance on behalf of the aliens. The government now contends, in its post-trial brief, that notwithstanding this court's finding of *de facto* detention, no "duly authorized [INS] official [ever] agree[d] to obligate the United States" to pay ECCH for the aliens' care.

II. THEORIES OF RECOVERY

A. *Statutory Basis*

Plaintiff cites 8 U.S.C. § 1252(c) and 42 U.S.C. § 249 as the statutory basis for recovery. It is well established that the United States, as sovereign, is immune from suit except to the extent that it has consented to be sued. *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976). In order for a claim against the United States founded on statute to be successful, the statute relied upon must contain language which could fairly be interpreted as mandating recovery of compensation from the government. 28 U.S.C. § 1491(a)(1); *Duncan v. United States*, 229 Ct.Cl. 120, 138, 667 F.2d 36, 47 (1981), *cert. denied*, 463 U.S. 1228, 103 S.Ct. 3569, 77 L.Ed.2d 1410 (1983); *Morgan v. United States*, 12 Cl.Ct. 247, 253 (1987). Accordingly, statutory language which is alleged to constitute a waiver of sovereign immunity with respect to money compensation "must be clear or strong before the court can say that the statute mandates compensation." *Mitchell v. United States*, 229 Ct.Cl. 1, 6, 664 F.2d 265, 268-69 (1981), *affirmed*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983).

Title 8 U.S.C. § 1252(c)(1982) provides in pertinent part: "The Attorney General is authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section." Title 42 U.S.C. § 249 (1982) provides:

> (a) . . . [A]t the request of the Immigration and Naturalization Service, any person detained by that Service, may be treated and cared for by the Public Health Service.
>
> . . . .

> (c) Persons whose care and treatment is authorized by subsection (a) of this section may, in accordance with regulations, receive such care and treatment at the expense of the Service from public or private medical or hospital facilities other than those of the Service, when authorized by the officer in charge of the station at which the application is made.

The problem with these statutes is that neither *mandates* compensation from the United States. Section 1252(c) cannot afford relief to plaintiff for its plain language precludes its being read as a money-mandating provision. Section 249(c) *authorizes* the payment of money by the Public Health Service to health care providers such as ECCH but only if two conditions are met: (1) Persons treated must be INS detainees, and (2) some "application" has to be made to and approved by a particular Public Health Service official. The first condition is satisfied in this case, given the finding of "de facto detention" which was announced in open court. But it is abundantly clear that plaintiff cannot satisfy the second condition. No "application" was made to a Public Health Service station nor approved by the "officer in charge of the station."

Thus, notwithstanding defendant's clear statutory authority to have arranged for the compensation of plaintiff for the medical services it rendered, and despite the fact that Congress has appropriated money for the very purpose,[7] the strict nature of the sovereign immunity

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[7] Defense counsel acknowledged at a post-trial status conference that INS receives an appropriation to pay for necessary medical care of alien detainees (transcript of April 28, 1988 conference at 7, 13, 14, 16 and 18). *See Medical Treatment of*

(Continued on following page)

doctrine dictates that ECCH cannot recover under its statutory theory. The statutes cited, which must be narrowly construed since defendant is the sovereign, simply do not appear to have been written with this kind of emergency situation in mind. To construe these statutes as mandating compensation under the facts of this case would amount to fitting a square peg into a round hole.

B. *Contract Implied-in-Law*

If the United States could be sued on contract obligations implied-in-law, this case would be easy to resolve. Here is a textbook example of a situation in which, "for reasons of justice and equity," the law routinely "creates" an obligation of reimbursement. *Collins v. United States*, 209 Ct.Cl. 413, 424, 532 F.2d 1344, 1351 (1976); *see also Hargrove v. United States*, 1 Cl.Ct. 228, 230 (1982). Had this case involved private parties, plaintiff would have been entitled to restitution under the implied-in-law, or "quasi-contractual," doctrine of emergency assistance. That doctrine holds:

(Continued from previous page)

Illegal Aliens: Hearing on H.R. 2400, H.R. 3697, H.R. 5031, H.R. 5977 and H.R. 6440 Before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 32 (1977) (statement of Hon. Leonel Castillo, Commissioner, INS); *see also* Supplement to Commissioner Castillo's subcommittee testimony (a legal memorandum prepared by INS' Office of General Counsel) at 2: "Each year, the [INS] requests and receives an appropriation from Congress for the express purpose of providing medical care to alien detainees" (Appendix to Plaintiff's Post-trial Brief).

> A person who has performed the duty of another by supplying things or services although acting without the other's knowledge or consent, is entitled to restitution from the other if
>
> (a) he acted unofficiously and with intent to charge therefor, and
>
> (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health or safety.

Restatement of Restitution § 115; *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830, 834 (2d Cir.), *cert. denied*, 434 U.S. 859, 98 S.Ct. 183, 54 L.Ed.2d 131 (1977); *United States v. Consolidated Edison of New York*, 580 F.2d 1122, 1127 (2d Cir.1978).

In the case at bar, given (1) the emergency situation, (2) ECCH's clearly manifested intention to be compensated for its services, (3) this court's finding of *de facto* INS detention and (4) the conceded duty of INS to furnish necessary medical care to its detainees,[8] plaintiff has

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[8] Parties' "Joint Memorandum Re: Stipulations," filed October 9, 1987, ¶2 ("Defendant . . . through the . . . INS . . . is responsible for the care of individuals taken into custody or detained by the United States Border Patrol as suspected illegal aliens"); Transcript of April 28, 1988 Status Conference at 7; *see also* Legal Memorandum of INS General Counsel, *supra* note 7 at 2 (and cases therein cited); *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983) ("the Due Process Clause requires the responsible government agency to provide medical care to suspects in police custody who have been injured while being apprehended by the police").

established all the requisites for recovery under the emergency assistance doctrine. However, because the defendant is the government, special rules apply. The government can be sued, in this or any court, only to the extent that it has relinquished its sovereign immunity. *United States v. Testan*, 424 U.S. at 399, 96 S.Ct. at 953; *United States v. Sherwood*, 312 U.S. 584, 587-88, 61 S.Ct. 767, 770-71, 85 L.Ed. 1058 (1941); *Tucker v. United States*, 7 Cl.Ct. 374, 376 (1985), Congress has undertaken no such relinquishment with respect to contract obligations implied-in-law. *Aetna Casualty & Surety Co. v. United States*, 228 Ct.Cl. 146, 164, 655 F.2d 1047, 1059-60 (1981); *People's Bank & Trust Co. v. United States*, 11 Cl.Ct. 554, 566 (1987).

C. *Contract Implied-in-Fact*

The government may be liable on contract obligations implied-in-fact, however, and this court has jurisdiction over such actions. 28 U.S.C. § 1491(a)(1); *Nitol v. United States*, 7 Cl.Ct. 405, 415 (1985); *Brannan v. United States*, 7 Cl.Ct. 399, 404 (1985). But defendant contends that the only contract plaintiff can establish here is one implied-in-law, on which the sovereign is immune to suit. This case does present an implied-in-law contract situation; however, the presence of an implied-in-law contract does not necessarily preclude the availability of alternative contractual bases of recovery. For example, in *United States v. Consolidated Edison Co. of New York*, 452 F.Supp. 638 (S.D.N.Y.1977), *affirmed in pertinent part*, 580 F.2d 1122 (2d Cir.1978), the court awarded implied-in-law contractual recovery under the doctrine of emergency assistance

while noting that the plaintiff would also have been entitled to recover for breach of an express oral contract were it not for a Statute of Frauds problem. 452 F.Supp. at 653.

Whether recovery under an implied-in-fact contract is available to plaintiff in the instant case depends on whether plaintiff has shown all the elements required to establish an express contract. *Yachts America, Inc. v. United States*, 779 F.2d 656, 661 (Fed.Cir.1985), *cert. denied*, 479 U.S. 832, 107 S.Ct. 122, 93 L.Ed.2d 68 (1986). There must be mutuality of intent, consideration, and a lack of ambiguity in offer and acceptance. *Id.; Squirrel Creek Associates v. United States*, 11 Cl.Ct. 212, 216 (1986); *Nitol v. United States*, 7 Cl.Ct. at 415. These contractual elements may be inferred from the conduct of the parties which shows, in light of the surrounding circumstances, their tacit understanding. *Algonac Mfg. Co. v. United States*, 192 Ct.Cl. 649, 673-74, 428 F.2d 1241, 1255 (1970); *DeRoo v. United States*, 12 Cl.Ct. 356, 361 (1987); *Hargrove v. United States*, 1 Cl.Ct. at 230.

In determining whether mutuality of intent has been established, it is important to remember that "for a contract to exist there does not have to be, and rarely is, a subjective 'meeting of the minds' all along the line." *Penn-Ohio Steel Corp. v. United States*, 173 Ct.Cl. 1064, 1084 n. 19, 354 F.2d 254, 266 n. 19 (1965), *quoting WPC Enterprises, Inc. v. United States*, 163 Ct.Cl. 1, 11, 323 F.2d 874, 879 (1963) (emphasis added). Rather, the inquiry is an objective one. Acceptance of the offer must be manifested by conduct which, viewed objectively, indicates assent to the proposed bargain. *See Russell Corp. v. United States*, 210 Ct.Cl. 596, 609, 537 F.2d 474, 482 (1976), *cert. denied*,

429 U.S. 1073, 97 S.Ct. 811, 50 L.Ed.2d 791 (1977). It is neither necessary nor practical to enter the minds of the parties. As the Court of Claims observed,

> A manifestation of mutual assent by the parties to a contract is essential to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; but, generally, neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.

Goltra v. United States, 119 Ct.Cl. 217, 251-52, 96 F.Supp. 618, 623 (1951).

Thus, in analyzing Agent Hernandez' statement to Fox as well as the conduct of other INS and ECCH personnel which was established at trial, the inquiry is not what the various actors intended their conduct to convey; instead, the question is whether the parties' conduct, viewed objectively, manifested and confirmed a tacit understanding that the INS had assumed payment responsibility for the aliens' care.

As noted above, there was a conflict in the testimony regarding precisely how Agent Hernandez responded to Kaye Fox's question about payment. Nevertheless, the meaning which Kaye Fox and Jay Comstock attached to Agent Hernandez' response was not a subject of dispute. In a memorandum written within hours of her conversation with Agent Hernandez, Kaye Fox stated her understanding that the INS, through Agent Hernandez, had assumed payment responsibility.[9] It is a well-established principle of contract law that

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[9] The issue of Agent Hernandez' authority to bind the Government is addressed in Section 1 below.

> the manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if . . . that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

Restatement 2d of Contracts § 20(2)(b); *Perez v. State of Maine*, 760 F.2d 11, 13 (1st Cir.1985).

Assuming that Agent Hernandez' version of the conversation was accurate, it is not surprising that Fox would have understood it as she did.[10] Indeed, defendant's counsel conceded in closing argument that "confusion . . . may have been generated by Hernandez' cryptic remark" (transcript, p. 228) and added:

> Mr. Comstock and Ms. Fox may well have thought they heard Mr. Hernandez say more than he did, more than his cryptic remark that when asked who's going to pay for it he responded "me and you" or "you and me." That remark could well be interpreted in the context as saying the Taxpayer and [as] implying that the United States would be responsible for payment, and it would not surprise me in the chaotic situation of an emergency room where a remark is made like that that it could be recalled later as being an assertion that the Border Patrol

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[10] In response to Kaye Fox's inquiry concerning payment, Agent Hernandez (or his supervisor Douglas Roy upon being informed of the exchange) could have said that he did not know who would pay or he could have asserted that the INS had no responsibility for payment. Instead, he gave an answer that was reasonably understood in the circumstances of its utterance to mean that the United States Government was going to pay.

> and the Immigration Service of the United States [were] responsible for the medical care.

(Transcript at 227). Defendant, in short, did have "reason to know the meaning attached" to Hernandez' remark by ECCH. Restatement 2d of Contracts, § 20(2)(b).

But can it be concluded that Kaye Fox had "no reason to know of any different meaning attached" by Agent Hernandez to the "me and you" response? In light of the circumstances, it would be difficult to find otherwise. Agent Hernandez had just recounted to Fox the events which culminated in the van accident. He was wearing his Border Patrol uniform with badge displayed. If, indeed, he answered "me and you" to the payment question, the objectively reasonable interpretation would be "me and you" as Federal taxpayers, i.e., the United States Government.

While it could be asserted that Fox might reasonably have interpreted Hernandez' reply to mean "me and you" as *state* taxpayers, or "me and you" as consumers of local medical services, such contentions lack appreciation of the surrounding circumstances. There was no proof that Fox and Agent Hernandez were previously acquainted. As a Border Patrol Agent, Hernandez would not necessarily share California taxpayer status with Fox; viewed from her perspective, he could as well have been a taxpayer from a distant state whom the Border Patrol had temporarily assigned to duty in California. Nor, for like reasons, would Hernandez necessarily share local consumer status with Fox. Simply put, "me and you," when uttered in this context, connoted commonality of status and interest; the only interest and status *evidently* shared by Hernandez and Fox was that of Federal taxpayer.

Accordingly, since the INS had reason to know the meaning attached to Hernandez' "cryptic remark" by ECCH, and ECCH had no reason to know Hernandez' different meaning, ECCH's understanding should prevail.

But ECCH's implied-in-fact contract claim does not stand or fall solely on the legal significance of the Hernandez/Fox discussion. This case presents an abundance of other conduct by the parties which tends to confirm the requisite "tacit understanding." Perhaps most significant is the cooperation between ECCH and INS. ECCH's actions of (1) notifying INS prior to the release of each alien, (2) sharing information with INS on the aliens' vital statistics, medical condition and progress, (3) surrendering aliens' property to INS and (4) notifying INS when one alien surreptitiously departed were all acts of cooperation *requested* and accepted by INS. Further, Investigator Novak's signing of consent forms as the alien patients' "parent, conservator or guardian" unambiguously suggested that INS' relationship to the aliens was that of responsible party. And Dr. Pavlik's conduct in obtaining medical records and monitoring progress and treatment again demonstrated INS responsibility for the aliens. Indeed, throughout late January and all of February 1985 (a period during which the hospital stay of all but one alien patient was completed), various representatives of the government came and went, and at no time did any of them say or do anything inconsistent with the understanding that INS stood as responsible party for the patients. Instead, an objective examination of the parties' behavior cannot fail to yield the unmistakable conviction that these parties had an unspoken understanding. The understanding was that INS, as the party responsible for

the aliens, possessed all the benefits and burdens that such responsibility entails including, necessarily, liability for cost of treatment.[11]

To summarize, objective analysis of the parties' conduct reveals that defendant (1) knew of plaintiff's concern about payment, (2) knew plaintiff could reasonably have taken Agent Hernandez' answer as an assumption of payment responsibility, (3) did nothing to dispel that notion, and (4) engaged instead in conduct which gave every indication that INS was the party responsible for the aliens. These circumstances illustrate that, between these parties, the equivalent of mutual assent was present. *Collins v. United States*, 209 Ct.Cl. at 424, 532 F.2d at 1351. Put another way, the parties' conduct indicates that plaintiff and defendant, in fact, took upon themselves corresponding obligations and liabilities and, viewed objectively, came to that meeting of the minds sufficient to establish an implied-in-fact contract. *Hirschmann v. United States*, 11 Cl.Ct. 338, 341-42 (1986).

1. *Authority to Bind the Government*

Defendant argues that even if the conduct of government officials in this case were otherwise sufficient to establish an implied-in-fact contract, none of those officials had authority to obligate the government. Unquestionably, just as with an express contract, officials whose conduct is relied upon to establish an implied-in-fact

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[11] The amount of this cost has been stipulated by the parties at $183,263.64.

contract must have actual authority to bind the government. *City of Alexandria v. United States*, 737 F.2d 1022, 1027 (Fed. Cir.1984); *ATL, Inc. v. United States*, 4 Cl.Ct. 672, 675, *affirmed in pertinent part*, 736 F.2d 677 (Fed.Cir.1984). Further, "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947).

The question whether a government actor has authority is frequently purely legal in nature, e.g., where a particular statute or regulation specifically enumerates the powers of particular officials. In other instances, the issue is a factual one. For example, where a statute permits delegation to lower-ranking officials, there may be a factual question whether the requisite delegation took place. If a factual showing is necessary, the affirmative burden of showing such facts rests with the plaintiff. *See Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed.Cir.1988); *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir.1984), *cert. denied*, 474 U.S. 818, 106 S.Ct. 64, 88 L.Ed.2d 52 (1985); *Jascourt v. United States*, 207 Ct.Cl. 955, 955-56, 521 F.2d 1406, *cert. denied*, 423 U.S. 1032, 96 S.Ct. 562, 46 L.Ed.2d 405 (1975); *Housing Corp. of America v. United States*, 199 Ct.Cl. 705, 711, 468 F.2d 922, 925 (1972).

In this case, as defendant correctly observes, there was no testimony concerning the authority of Agent Hernandez to obligate defendant to pay for medical care. Accordingly, if plaintiff could prevail only through a factual showing of Hernandez' actual authority, its failure

to carry this burden would compel a finding of no binding contract.

But where authority is in issue, analysis should begin with the law. This court knows of no statute, regulation or case which would preclude Agent Hernandez' exercise of government authority to obligate funds for emergency medical treatment of detainees injured during the course of apprehension.[12] Instead, there exists at least one case that indicates government actors may have enhanced authority to obligate funds during emergencies.

This case arises from an emergency situation. Agent Hernandez was the first Border Patrol officer at the hospital. Government officials who might not otherwise have authority to make arrangements and incur obligations on behalf of the government may be able to exercise such authority during an emergency so that immediate remedial action can be taken. *See Halvorson v. United States,* 126 F.Supp. 898 (E.D. Wash.1954). The *Halvorson* case illustrates the propriety of permitting an otherwise unauthorized person to obligate the government in an emergency. In *Halvorson,* a three-day Montana blizzard had caused the accumulation of some four feet of snow in the attics of buildings under construction for the U.S. Army Corps of Engineers. 126 F.Supp. at 900. If the snow,

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[12] *See People's Bank & Trust Co. v. United States,* 11 Cl.Ct. 554, 565 (1987) ("Requiring citizens dealing with the Government to determine the absence of authority from a confusing, technical and hard-to-find regulation, following a representation from the Government to the contrary, is bad enough when the prohibitory regulation has been printed. Expecting a [citizen] in this situation to determine lack of authority when no regulation even exists is well-nigh intolerable").

which had blown in through ventilation slots, had not been removed immediately, great damage would have resulted to plastered ceilings and walls below. *Id.* The district court held that Corps of Engineers officials on the scene had "authority to direct the contractors to proceed at once to minimize the damage by immediate remedial action," and awarded contractual recovery to plaintiff for the cost of the snow removal. 126 F.Supp. at 901.

Thus, it is concluded that the question of authority in this case simply does not admit of an easy answer. However, even assuming that Agent Hernandez lacked authority to bind the government, his conduct was nevertheless ratified by INS.

2. *Ratification*

Ratification, to be effective, requires knowledge of the facts. *United States v. Beebe,* 180 U.S. 343, 354, 21 S.Ct. 371, 375, 45 L.Ed. 563 (1901); *Williams v. United States,* 130 Ct.Cl. 435, 447, 127 F.Supp. 617, 623 *cert. denied,* 349 U.S. 938, 75 S.Ct. 783, 99 L.Ed. 1266 (1955); *Timberland Paving & Construction Co. v. United States,* 8 Cl.Ct. 653, 661 n. 22 (1985). Knowledge "must be shown or such facts proved that its existence is a necessary inference from them." *United States v. Beebe,* 180 U.S. at 354, 21 S.Ct. at 375. Here, there can be no dispute that INS had knowledge of all the conduct pertinent to this court's finding of an implied-in-fact contract. Indeed, even in the face of the knowledge defendant possessed, especially its knowledge of Agent Hernandez' payment discussion with Kaye Fox and his alleged "cryptic reply," INS took no action to assert its non-liability for the aliens' care until its letter dated

March 7, 1985. By that time, all but one of the aliens had already been discharged from the hospital and taken into custody by INS. *See* Plaintiff's Exhibits 21 and 41 and note 6, *supra*. Instead, as detailed above, there were numerous instances of confirming conduct. Such behavior can spell only acquiescence and ratification by silence and inaction[13] as well as by conduct. *See Williams v. United States*, 130 Ct.Cl. at 447, 127 F.Supp. at 623; *Centre Mfg. Co. v. United States*, 183 Ct.Cl. 115, 128, 392 F.2d 229, 236 (1968).

III. THE SLIPPERY SLOPE

During oral argument, defendant's counsel expressed concern that a decision for plaintiff might "turn the Immigration and Naturalization Service and Border Patrol into a general health insurer for people illegally in the United States" (transcript at 221). The discussion set forth above should lay to rest the government's anxiety regarding the sweep of this decision. The presence in this case of peculiar facts renders defendant's floodgate argument unpersuasive.

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[13] Indeed, INS had ample opportunity to deny its liability while most of the aliens were still hospitalized. Kaye Fox undertook to confirm INS' obligation of payment over the course of several weeks in early February 1985, but she "couldn't get anyone to call [her] back" (trial tr. at 47). Finally, late in February, Fox and a Dr. Kurland of ECCH spoke with INS' James O'Keefe in Los Angeles (trial tr. at 48). O'Keefe was the official in charge of all management functions at INS' Western Regional Office (trial tr. at 116). Instead of denying INS liability, O'Keefe merely promised to "check into" the matter (trial tr. at 48).

IV. CONCLUSION

Based on the findings of fact, conclusions of law and related reasoning announced in open court and set forth in this opinion and, further, based on the parties' stipulation of quantum, it is ORDERED that judgment be entered in favor of plaintiff in the principal sum of $183,263.64, together with interest thereon from May 13, 1985 as provided by 41 U.S.C. § 611.

Supreme Court, U.S.
FILED
MAY 29 1991
OFFICE OF THE CLERK

No. 90-1508

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF EL CENTRO, CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
DAVID M. COHEN
BARBARA C. BIDDLE
DOMENIQUE KIRCHNER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Border patrol agents "detained" aliens, for purposes of 42 U.S.C. 249, by ordering the van in which the aliens were riding to stop even though the van fled from the agents, instead of stopping.

2. Whether the circumstances of this case created an emergency situation that would alleviate the usual need to prove, in order to establish an implied-in-fact contract, that the government representative in question had the actual authority to bind the government.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 922 F.2d 816. The opinions of the Claims Court are reported at 16 Cl. Ct. 500 (Pet. App. A45-A68) and 17 Cl. Ct. 794 (Pet. App. A25-A44). The unpublished findings of the Claims Court are not reprinted in the petition appendix, but can be found at C.A. App. 21-38.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1990. The petition for a writ of certiorari was filed on March 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal government has the authority and responsibility to protect the integrity of the borders of the United States. U.S. Const. Art. I, § 8. This responsibility is assigned to the Attorney General, who carries out this duty, in part, through the Border Patrol Division of the Immigration and Naturalization Service (INS). 8 U.S.C. 1103(a); 28 C.F.R. 0.105; 8 C.F.R. 100.2. The Attorney General is authorized to expend funds for the operation of facilities for the detention of aliens against whom a final order of deportation has already been made. 8 U.S.C. 1252(c). Also, "any person detained by [the INS] may be treated and cared for by the Public Health Service." 42 U.S.C. 249(a). If a person or entity other than the Public Health Service provides such treatment, Section 249(c) provides for payment by the Public Health Service "when authorized by the officer in charge of the station at which the application is made."

2. On January 23, 1985, Border Patrol agents observed several vans parked beside Interstate 8, west of El Centro, California, in an area known to be a rendezvous point for smugglers bringing aliens across the border illegally. At about the same time, the agents learned that Border Patrol sensors had detected a group crossing the border. Shortly thereafter, the agents saw one of the vans traveling eastward on the highway. They attempted to stop the van by following it and activating their red emergency lights, but the van fled at high speed. In an effort to evade his pursuers, the driver of the van swerved off the highway onto an exit ramp. He failed to negotiate a turn at the top of the exit ramp, however, and the van vaulted over the embankment and exploded. The agents radioed for assistance and attempted to extinguish the flames. The driver and two passengers were killed; 14 of the passengers were injured and were taken by ambulance to El Centro Community Hospital (ECCH).

Pet. App. A2-A3, A46-A47.[1] No one was taken into custody at the scene of the accident. C.A. App. 23-25, 30, 219-220, 227-228.

Border Patrol Agent Mario Hernandez, who was not at the scene of the accident, was ordered to proceed to ECCH to obtain information about the survivors for the Border Patrol's accident report. He arrived at the hospital in uniform shortly before the ambulances. Pet. App. A48. In a conversation with Kaye Fox, the hospital's Assistant Director of Finance, Agent Hernandez identified himself as a Border Patrol agent and explained the circumstances surrounding the accident. *Id.* at A49. When asked who would pay the cost of the aliens' medical care, he testified that he replied, "Me and you." *Id.* at A49; C.A. App. 140. Ms. Fox further testified that Agent Hernandez said that the INS would pay because the aliens were in custody. Pet. App. A49; C.A. App. 75. Agent Hernandez reported this conversation to his supervisor, but he denied stating that the aliens were in custody or that the INS would pay for their care. C.A. App. 141-142; see also *id.* at 144-145.[2] He also took custody of one alien's passport, which a nurse had found on the emergency room floor. Pet. App. A50.[3] Finally, Agent Hernandez told a nurse that the Border Patrol should be notified before each alien was discharged, so that an INS agent could take the alien into custody. *Id.* at A3, A50.

Two INS investigators visited the hospital, photographed each alien, and signed the hospital's release forms for the

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[1] Two others were taken to another hospital. Payment for their care and treatment is not the subject of this litigation.

[2] The Claims Court declined to resolve this conflict in the witnesses' testimony. Pet. App. A49 n.4.

[3] The passport belonged to an alien who had been air-lifted to a hospital in San Diego. Pet. App. A50 n.5.

photographs on the line marked "Patient/Parent/Conservator/Guardian." Pet. App. A3, A50-A51. In addition, an INS doctor visited the hospital to review the aliens' medical records and stated that he was "responsible for medical follow-up to make sure [ECCH] doctors were taking care" of the aliens. *Id.* at A3, A51. No guard was placed at the hospital. C.A. App. 24, 31. Each time the hospital prepared to discharge one of the aliens, the hospital notified the Border Patrol, and an agent took the alien to the Border Patrol station. Pet. App. A51. When one alien left without being discharged, he was listed by the Border Patrol as having "escaped," *id.* at A51-A52, although the agents did not complete any of the reports required when an alien escapes from Border Patrol custody. C.A. App. 31, 186-188.

Ms. Fox, the ECCH assistant finance director, contacted Donald Davis, the INS Agent-In-Charge of the El Centro Station, in order to clarify how the hospital would be reimbursed for the medical care afforded to the aliens. Davis referred her to James O'Keefe, a management official in INS's regional office. When Fox contacted Mr. O'Keefe, he did not expressly deny liability and said that he would "check into" the matter. Pet. App. A67 n.13.

The hospital submitted invoices to INS in the amount of $183,263.64. The Regional Director of the INS responded to each invoice with a letter denying liability on three grounds: (a) the aliens had not been injured as a result of INS negligence; (b) the aliens were not in custody when they were hospitalized; and (c) the agents acted only as "good Samaritans" in calling for the ambulances following the accident. Pet. App. A52, A68.

3. Petitioner, the City of El Centro, brought this action in the United States Claims Court, asserting that it was entitled to reimbursement for the cost of treating the aliens by virtue of two statutes, 8 U.S.C. 1252(c) and 42 U.S.C.

249, or under an implied-in-fact contract theory. After a trial, the Claims Court found that the aliens were not in custody during the pursuit or at the scene of the accident, but were in de facto custody at the time of their hospitalization. Pet. App. A46; C.A. App. 21-38. The court dismissed petitioner's statutory claims, Pet. App. A53-A55, but found an implied-in-fact contract for reimbursement between the parties. *Id.* at A63. In so ruling, the court relied on statements by Agent Hernandez to ECCH's representatives on the night of the accident, on the conduct of other Border Patrol and INS officials during the ensuing weeks, and on the failure of the INS expressly to deny liability for the cost of the aliens' hospital care until almost all of the aliens had been discharged. *Id.* at A59-A63. Although petitioner had not established that Agent Hernandez or any INS official with whom petitioner dealt had the requisite authority to bind the United States in contract, the court imputed the requisite authority to Agent Hernandez because he may have been able to exercise such authority during an emergency. *Id.* at A65-A66. Alternatively, the court held that the INS had ratified the actions of Agent Hernandez because the "INS had knowledge of all the conduct pertinent to this court's finding of an implied-in-fact contract" and the "INS took no action to assert its non-liability for the aliens' care until its letter dated March 7, 1985." *Id.* at A66; see *id.* at A32-A34. The court also held that the INS ratified the actions of its agents by accepting the benefits flowing from their conduct. *Id.* at A34.

4. The court of appeals reversed by a divided vote. Pet. App. A1-A24. The court agreed with the Claims Court that neither 8 U.S.C. 1252(c) nor 42 U.S.C. 249 required the government to pay petitioner compensation for the hospital's care and treatment of the aliens, and that, in any event, petitioner had not complied with the statutory requirements for obtaining payment under 42 U.S.C. 249. Pet.

App. A5-A7.[4] The court, however, disagreed with the Claims Court's ruling that there was an implied-in-fact reimbursement contract between the parties.

The court stated that an implied-in-fact contract with the government requires proof of: (1) mutuality of intent to contract; (2) consideration; (3) lack of ambiguity in offer and acceptance; and (4) sufficient conduct by a government representative having actual authority to bind the government in contract. Pet. App. A7-A8. The court concluded that, in this case, there was no implied-in-fact contract because petitioner did not establish elements 2 and 4. *Id.* at A10-A17. With respect to the fourth element, the court found that Agent Hernandez did not have the requisite contracting authority and that no official with such authority promised to pay for the aliens' treatment. *Id.* at A9, A12. With respect to the second element—consideration—petitioner had argued that, because the aliens were detained by the government and because the government is responsible for the care and treatment of such detainees under 42 U.S.C. 249, petitioner's treatment conferred a benefit upon the government. The court of appeals determined that the Claims Court erred in finding that the aliens were detained either before or during their hospitalization of the aliens. *Id.* at A15. Relying on *Brower* v. *County of Inyo*, 489 U.S. 593 (1989), the court found that the INS's pursuit of the fleeing vehicle which ended in the crash did not constitute a detention. Pet. App. A15. Nor did the INS detain the aliens after the crash, the court added, because the INS agents did not take physical custody of the aliens. In fact, the court noted, the hospital and the INS understood that the hospital would contact the INS before an alien was released so that the INS could then take each alien into

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[4] The dissent did not disagree with the majority on those points. See Pet. App. A18-A24 (Rich, J., dissenting).

custody. *Ibid.* Because the aliens were not detained by the INS, INS had no responsibility to provide care for the aliens. *Ibid.*

ARGUMENT

1. Petitioner first contends that the court of appeals erred by finding that the consideration element for an implied-in-fact contract was lacking. Pet. 10-23. Petitioner's argument that the government received consideration proceeds in two steps. First, petitioner states that the government stipulated at trial that the INS is statutorily responsible for the treatment of aliens "taken into custody or detained" by the Border Patrol. Pet. 12. Second, petitioner argues that the Border Patrol agents' pursuit of the aliens' vehicle was a "detention" of the aliens from the outset, and that the aliens were thus in INS's "custody" throughout their stay in the city's hospital. Pet. 12-13. That argument lacks merit.

a. Petitioner's argument hinges on its reading of the phrase in the government's stipulation stating that the INS is responsible for the treatment of aliens "taken into custody or detained" by the INS. See Pet. 10. Petitioner assumes that the term "detained" in that stipulation has the same meaning as the term "detention" or "seizure" under the Fourth Amendment, but that assumption is mistaken.[5]

As the court of appeals noted, the government's obligation to treat aliens is set out in 42 U.S.C. 249, which also

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[5] "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs through all legal discussions. It has all the tenacity of original sin and must constantly be guarded against." Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 337 (1933).

uses the term "detained."[6] That term is commonly used in the immigration laws to refer to taking an alien into the physical custody of the INS. See, *e.g.*, 8 U.S.C. 1222 (authorizing the detention of aliens for purposes of conducting medical examinations), 1225(b) (authorizing the detention of aliens who are not clearly entitled to land), 1252(c) (authorizing the Attorney General to select the site of detention pending deportation), 1282(b) (authorizing the detention of alien crewman who do not intend to leave with their ship). That interpretation of the term "detained" is a sensible one in this context as well, since the federal government has the obligation to provide aliens in the actual, physical custody of the INS with necessary medical care. See *City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 244 (1983). Cf. *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 198-200 (1989); *Youngberg* v. *Romeo*, 457 U.S. 307, 314-316 (1982). In this case, the federal government did not have physical custody of the aliens, however, until they were discharged from the ECCH. Only at that point were they detained by the INS and, therefore, only at that point did the federal government assume responsibility to ensure that the aliens received medical care. The court of appeals therefore correctly ruled that the federal government was not obligated by federal law to pay the ECCH for the medical care that the aliens received at the hospital.[7]

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[6] As the court of appeals noted, Section 249 is permissive and does not mandate treatment even for those who are "detained."

[7] Any constitutional right that the aliens may have had to receive necessary medical care is personal to them, and the federal government does not have a constitutional obligation to reimburse a hospital for the care of persons in the physical custody of the INS. In fact, hospitals such as ECCH that receive public funding have an independent duty to provide medical care to indigents who require emergency treatment. See 42 U.S.C. 291c(e).

b. In any event, petitioner's argument would lack merit even if the term "detained" as used in the trial stipulation and 42 U.S.C. 249 had the same meaning as the term "seizure" in the Fourth Amendment. Petitioner maintains that a "seizure" occurs whenever a law enforcement officer, through a show of authority, signals a person to stop. Pet. 19-23. Recently, however, this Court has twice clearly rejected that argument. In *Brower* v. *County of Inyo*, *supra*, the Court explained that police officers did not seize a fleeing suspect until his fatal crash into a police-erected barricade, even though the preceding 20-mile chase was surely an adequate "show of authority." 489 U.S. at 599. In *California* v. *Hodari D.*, 111 S. Ct. 1547, 1552 (1991), the Court assumed that an officer's close-range pursuit of a fleeing suspect was a "show of authority," but held that the suspect was not "seized" until he was tackled by an oncoming officer. Both cases made clear that a Fourth Amendment "seizure" occurs only when a law enforcement officer (or another governmental agent) intentionally acquires physical control over a person or object. *California* v. *Hodari D.*, 111 S. Ct. at 1549-1552; *Brower* v. *County of Inyo*, 489 U.S. at 596-597.[8]

In this case, the Border Patrol, through a show of authority, signalled to the driver of the aliens' van to halt, but the

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[8] *Hodari D.* also makes clear that petitioner errs in relying, see Pet. 19, on the so-called *Mendenhall* test that was originally formulated by Justice Stewart in *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980), and was adopted by the Court in later cases, *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988); *INS* v. *Delgado*, 466 U.S. 210, 215 (1984). That test provides that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. at 554. *Hodari D.* made clear that the *Mendenhall* test is a necessary but not a sufficient condition for a seizure. 111 S. Ct. at 1551.

driver did not stop. The Border Patrol command was not a "seizure," since the van did not yield to it. As the Court explained in *California* v. *Hodari D.*, if a person flees after being told to halt by a law enforcement officer, "[t]hat is no seizure." 111 S. Ct. at 1550. The driver continued until the accident occurred. Although the aliens then came to rest temporarily, there was still no "seizure," because the Border Patrol agents did not intend to cause the aliens' van to crash. See *Brower* v. *County of Inyo*, 489 U.S. at 597. After the crash, the injured aliens were taken to the ECCH, where they remained until their release into the custody of the INS. The Claims Court found that the INS did not acquire physical custody over the aliens until that point, see C.A. App. 21-38; the court of appeals did not disturb that finding, see Pet. App. A13; and petitioner does not challenge it in this Court. Under these circumstances, the INS did not incur an obligation to provide for the medical care of the aliens until the agency had actual, physical control over them.

c. Petitioner also maintains that review by this Court is necessary to resolve a conflict among the circuits on the question whether a "seizure" for purposes of the Fourth Amendment requires a law enforcement officer to have physical control over a suspect. Pet. 13-19. This Court recently resolved that precise question in *California* v. *Hodari D.*, however, by holding that a "seizure" requires physical control over a suspect. 111 S. Ct. at 1549-1552.[9]

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[9] There is also less to the alleged conflict than meets the eye. Prior to *Brower* v. *County of Inyo*, the Ninth Circuit had ruled that a police officer's use of a patrol car's flashing lights or siren constitutes a stop. *United States* v. *Morrison*, 546 F.2d 319, 320 (1976); see also *United States* v. *Kerr*, 817 F.2d 1384 (1987); *United States* v. *Robert L.*, 874 F.2d 701 (1989) (both following *Morrison*). But that court did not reconsider this issue in light of this Court's decision in *Brower* v. *County of Inyo*. The Ninth Circuit's decisions in *Morrison* and *Kerr* predated *Brower*; that court's decision in *Robert L.* postdated *Brower*, but the

2. Petitioner contends that the court below erred by ruling that, to establish an implied-in-fact contract, a party must prove that the contracting government official had the authority to bind the government. Petitioner agrees that a person who enters into an agreement with the government generally bears the risk that the contracting officer has exceeded his authority. Petitioner argues, however, that there should be an exception to that rule in the case of emergencies. Pet. 23-30. That claim does not warrant further review.

To begin with, petitioner must prevail on both questions in order for the judgment below to be set aside. Accordingly, unless petitioner can prove that the federal government received adequate consideration, petitioner cannot establish an implied-in-fact contract regardless of how the second question is answered. Because petitioner cannot show that the government received consideration, this Court would not need to reach the second question presented if certiorari were granted.

In any event, the court of appeals did not reject petitioner's claim as a matter of law. Instead, the court simply found that, on the facts of this case, there was no emergency requiring the federal government to appropriate private property in order to protect the public interest. Pet. App. A10. To the contrary, the court noted, "[t]he hospital was preparing to attend to the injured aliens." *Ibid.*[10]

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court there did not cite or discuss *Brower*. Like the Ninth Circuit, the Eighth Circuit prior to *Brower* had ruled that a police officer's use of a patrol car's flashing lights or siren constitutes a stop. *Carpenter* v. *Sigler*, 419 F.2d 169, 171 (1969); see also *United States* v. *Nicholas*, 448 F.2d 622 (1971); *United States* v. *Owens*, 472 F.2d 780 (1973) (both following *Carpenter*). After *Brower*, however, the Eighth Circuit changed its view and held that police pursuit alone, even if the car's lights are flashing or the siren is blaring, does not constitute a seizure. *Patterson* v. *City of Joplin*, 878 F.2d 262 (1989); *Roach* v. *City of Frederickstown*, 882 F.2d 294 (1989).

[10] For that reason, the decision below does not conflict with *Halvorson* v. *United States*, 126 F. Supp. 898 (E.D. Wash. 1954), on

The court of appeals' decision that there was no implied-in-fact contract also rests on settled principles that do not require clarification. It is clear that the creation of an implied-in-fact contract requires actions by a government officer with the authority to bind the government in contract. *Eastern Extension Telegraph Co.* v. *United States*, 251 U.S. 355, 363, 366 (1920). That conclusion is an application of the general principle that the government "is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917). As this Court has made clear: "[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947) (government insurance contract that is contrary to regulations is not enforceable). Accord *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666 (1869) (bills of exchange issued by the Secretary of War who lacked necessary statutory authority were not enforceable).

This Court recently reiterated those principles in *OPM* v. *Richmond*, 110 S. Ct. 2465 (1990). In *Richmond*, the plaintiff detrimentally relied upon erroneous advice from a federal employee. The Court denied the plaintiff's claim for compensation on the ground that the conditions defined by Congress for charging the public treasury must be strictly observed, and the claim was contrary to the rele-

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which petitioner relies, Pet. 28 n.8, in which the court found that an emergency existed. The remaining decisions cited by petitioner are earlier Court of Claims decisions. Petitioner's allegation of an intracircuit conflict, however, is for the Federal Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

vant law. 110 S. Ct. at 2469. The rationale of the *Richmond* case is instructive in this context. Application of the principle that a government official must have the authority to bind the government assures that public funds will be spent only according to the judgments reached by Congress, and not according to the mistakes of government agents. Compare *id.* at 2473.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
DAVID M. COHEN
BARBARA C. BIDDLE
DOMENIQUE KIRCHNER
Attorneys

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